SUPREME COURT, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1005

NATIONAL ORGANIZATION FOR WOMEN, INC., CATHLEEN BEASLEY, BONNIE HALASCSAK and LESSIE BOLIN FIX, on behalf of themselves and similarly situated females,
*Intervenor Applicant and Intervenors-Petitioners,*

UNITED STATES OF AMERICA by William Saxbe, the Attorney General on behalf of PETER J. BRENNAN, the Secretary of Labor, and the EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
*Plaintiffs-Respondents,*

v.

ALLEGHENY-LUDLUM INDUSTRIES, INC., ARMCO STEEL CORPORATION; BETHLEHEM STEEL CORPORATION; JONES & LAUGHLIN STEEL CORPORATION; NATIONAL STEEL CORPORATION; REPUBLIC STEEL CORPORATION; UNITED STATES STEEL CORPORATION; WHEELING-PITTSBURGH STEEL CORPORATION; YOUNGSTOWN SHEET & TUBE COMPANY; and UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
*Defendants-Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## SUBJECT INDEX


| | Page |
|---|---|
| Opinions Below | 2 |
| Jurisdiction | 2 |
| Questions Presented | 2 |
| Statutes Involved | 3 |
| Statement of the Case | 3 |
| Reasons for Granting the Writ | 4 |
| A. The Intervention Question | 4 |
| B. The Waiver Question | 8 |
| C. The Inadequacies of the Consent Decrees | 8 |
| Conclusion | 13 |
| Appendix | A-1 |


## TABLES OF AUTHORITY

### Table of Cases


*Albemarle Pape Co. v. Moody*, 442 U.S. 405, 95 S. Ct. 2362, 44 L. Ed. 2d .... (1975) ..... 9, 10, 11

*American Jerex v. Universal Aluminum Extrusions*, 340 F. Supp. 524 (D. Ct. N.Y. 1972) ..... 7

*Bing v. Roadway Express, Inc.*, 485 F.2d 441 ..... 11

*Donaldson v. United States*, 91 S. Ct. 534 (1971) ..... 7

*Dowdy v. Hawfield*, 189 F.2d 637 (D.C. Cir. 1951) *cert. denied*, 72 S. Ct. 54 ..... 7

*EEOC v. AT&T Co.*, 365 F. Supp. 1105 (E.D. Pa. 1973) *affirmed in part, dismissed in part*, 506 F.2d 735 (3d Cir. 1974) ..... 7

*EEOC v. United Airlines*, 515 F.2d 946 (7th Cir. 1975) 5

*Erie Human Relations Commission v. Tullio*, 493 F.2d 371 (2d Cir. 1974) ..... 10

*Page*

*Hodgson v. UMW*, 55 F.R.D. 227 (D. Ct. Pa. 1972) ..... 7

*Johnson v. Goodyear Tire Co.*, 491 F.2d 1364 (5th Cir. 1974) ..... 9

*Meatcutters v. Safeway Stores*, .... F. Supp. ...., 4 FEP Case 510-511 (D. Ct. Kan. 1972) ..... 12

*Now v. Bethlehem Steel*, Civ. No. M-74-377 (D. Ct. Md., pending) ..... 7

*Trbovich v. UMW*, 404 U.S. 528, 92 S. Ct. 630 ..... 6-7

*UAW v. Scofield*, 382 U.S. 205 (1965) ..... 6

*United States v. Jacksonville Terminal*, 451 F.2d 418 (5th Cir. 1972) *cert. denied*, 406 U.S. 906 (1972)..... 9

*Wickert v. Hoppock*, 6 Wall. 94 ..... 11

**Statutes**

Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e *et seq.* .....2, 3, 5, 8, 11

§ 706 .....6, 7

§ 706(f)(1) ..... 5

§ 707 .....5, 6, 7

§ 707(e), 42 U.S.C. § 2000e-6(e) ..... 6

28 U.S.C. § 1254(1) ..... 2

**Other Authority**

Fed. R. Civ. P. 24 .....2, 3, 8

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*Defendants-Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on August 18, 1975.

## OPINIONS BELOW

The decision and order of the United States District Court for the Northern District of Alabama, dated June 7, 1974, is reported at 63 F.R.D. 1 and set forth on pages A-26-A-32 of the Appendix to this Petition.[1] The decision of the United States Court of Appeals for the Fifth Circuit is reported at 517 F.2d 826 and set forth in part at App. A-1-A-25.

## JURISDICTION

The opinion of the Court of Appeals was filed on August 18, 1975. On November 6, 1975, Mr. Justice Powell signed an order extending the time for filing a petition for a writ of certiorari to and including January 15, 1975. This Court has jurisdiction to review the judgment herein by writ of certiorari under 28 U.S.C. Sec. 1254(1).

## QUESTIONS PRESENTED

1. Whether the Court below misconstrued Title VII, 42 U.S.C. Sec. 2000e, and the applicability of Rule 24, F.R.C.P. by holding that intervention is inappropriate in Section 707 pattern and practice employment discrimination cases.

2. Whether the Court of Appeals erred insofar as it held valid a waiver, executed pursuant to a Government consent decree, of the right to sue for injunctive relief and back pay to remedy the failure by an employer or a union subsequent to the entry of that decree, to eliminate the continued effect of past discrimination.

3. Whether the Court below erred in approving the consent decrees which purport to remedy the discriminatory practices systemic to the steel industry but which fail to ensure female employees their rightful place and otherwise to accomplish the purposes of Title VII and Executive Order 11246, as amended.

1. The Appendix to this Petition will be referred to herein as "App."

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## STATUTES INVOLVED

The statute involved herein is Title VII to the 1964 Civil Rights Act, as amended, 42 U.S.C. Sec. 2000e *et seq.* Also involved in these proceedings are Executive Order 11246, as amended, 3 C.F.R. 169 *et seq.* and Rule 24 of the Federal Rules of Civil Procedure which provides in pertinent part:

"Rule 24.

Intervention

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (2) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common * * *."

## STATEMENT OF THE CASE

The facts in this case are not in substantial dispute and are in large part adequately set forth in the decision of the Court of Appeals. It should be noted, however, that the record below contains evidence, discussed by neither the Appellate Court nor the District Court, that petitioner National Organization for Women, Inc. (hereinafter "NOW") sought to discuss with the Equal Employment Opportunity Commission (hereinafter "EEOC") the subject matter of

the consent decrees long before any agreement thereon was reached among the parties.[2] NOW's request to participate in the discussions as well as to share with the parties the concerns of the women it represents was summarily rejected by the EEOC.[3] Similarly, although the petitioner requested an opportunity to present certain limited evidence on issues it claimed inadequately remedied by the decrees, the District Court refused to allow such a hearing. (App. A-28).[4]

## REASONS FOR GRANTING THE WRIT

### A. The Intervention Question

The Court's decision prohibiting intervention in pattern and practice cases has serious and potentially invidious

2. The decrees had been negotiated in a series of meetings in which no affected employee nor their civil rights representative participated. In November 1973, petitioner's representatives met with representatives of the United States Department of Justice to express NOW's concerns about systemic discrimination in the steel industry. A similar meeting was held with EEOC Chairman Powell in February, 1974. On March 21, 1974 NOW wrote to Powell confirming its interest in the steel industry negotiations and advising him that now was representing several classes of women who had filed charges of discrimination with the EEOC. NOW asked, *inter alia*, that it be kept advised as to the status of negotiations so that it could represent the interests of its members, and particularly that NOW be notified of any potential settlement sufficiently in advance of the filing of the consent decree so that it could determine whether it would be in the best interests of the women it represents to seek to join in the action as a party plaintiff. (See record in court below at pp. 85-86).

3. On April 9, 1974 EEOC Chairman Powell acknowledged NOW's interest in the negotiations but stated:

> "It is not, however, our policy to submit for review outside of government channels proposed consent decrees."

(See record in court below at p. 87).

4. Anomalously the Court below noted that "the female appellants did not introduce any evidence into the record which might enable a court to develop this point [NOW's challenge to the decrees' failure to provide certain remedies] in greater detail." (App. A-25). Thus the Appellate Court rejected such contentions on which petitioner had been denied the opportunity to present evidence to the District Court or even to discuss its serious concerns with the EEOC, notwithstanding its timely raising thereof.

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implications for the accomplishment of Title VII's objectives. The Court below held that whereas Sec. 706(f)(1) of the Act confers a right of intervention to aggrieved parties or their representatives, no such intervention right obtains under Sec. 707, so-called pattern and practice cases (App. A-10-A-12). In this respect, the Court's holding appears to present an issue of first impression.[5]

In so ruling, the Court below ignored the valuable role, acknowledged generally by this Court and every appellate court, of the "private attorneys general" which has in the past been critical to enforcement of the Act. If the Court's decision were allowed to stand, the EEOC and alleged discriminators would have *carte blanche* to negotiate "pattern and practice" agreements without any input from members of the affected class or classes. It cannot be gainsaid that the EEOC with its notorious backlog, budgetary problems, etc., has concerns in such settlements which are not entirely on all fours with those of the employees concerned. Nor can the EEOC, in the course of its discussions with the putative respondents be expected to be cognizant with all of the problems and discriminatory conditions in a given industry. Here, for example, NOW offered to introduce evidence of a range of discriminatory practices, past and present, which were not addressed by the decrees purporting to bring the respondents into compliance with the Act.[6] Nonetheless, the Court below placed its imprimatur upon the EEOC's callous refusal even to listen to concerns of the thousands of female employees represented by petitioner.

5. The Court relies in part on *dicta* in *EEOC v. United Airlines*, 515 F.2d 946 (7 Cir. 1975). That case, however is not dispositive of the issue inasmuch as the denial of intervention therein was based upon untimeliness, as the Fifth Circuit acknowledged.

6. See *infra*, pp. A-8-A-12.

The role of the aggrieved party as intervenor is inherent in the statutory scheme. Indeed, Section 707(e), 42 U.S.C. Sec. 2000e—6(e) specifically incorporates Sec. 706 procedures into actions brought pursuant to Sec. 707, including the right to intervene. Inasmuch as Section 707 actions attempt to adjudicate broader issues and create more effective, far reaching remedies than do Section 706 actions, there is logically even more justification for inferring that Congress intended a role for the aggrieved or their representatives in such cases.

In *Trbovich v. UMW*, 404 U.S. 528, 92 S. Ct. 630, this Court recognized the importance of intervention to protect private interests such as those represented by NOW, saying [404 U.S. at 538-539]:

> "The statute plainly imposes on the Secretary the duty to serve two distinct interests which are related but not identical. First the statute gives the individual union member certain rights against their union and the Secretary of Labor becomes the union member's lawyer for the purpose of enforcing these rights. 104 Cong. Rec. 10947, 1958, remarks of Senator Kennedy. Second, the Secretary has an obligation to protect "the vital public interest in assuring free and democratic union elections that transcends the narrower interest of the complaining union member. *Wirtz v. Local 153 Glass Blowers Association*, 389 U.S. 463, 475 S. Ct. 643, 19 L.Ed. 705 (1968). Both functions are important and they may not always dictate the same approach to the conduct of the litigation. Even if the Secretary is performing his duties, broadly conceived, as well as can be expected, the union member may have a valid complaint about the performance of "his lawyer". Such a complaint filed by the member who initiated the entire enforcement pro-

7. This Court has consistently protected the private rights of organizations such as NOW in cases by the government seeking to vindicate public interests. See, eg., *UAW v. Scofield*, 382 U.S. 205 (1965).

BLEED THROUGH

ceeding should be regarded as sufficient to warrant relief in the form of intervention under Rule 24(a)(2)."

Thus under the *Trbovich* rationale, the Court below erred in approving denial of intervention to petitioner representing the interests of women whose charges, at least in part, presumably gave rise to the government's investigation of and action against the Steel industry.[8] See also, *Hodgson v. UMW*, 55 F.R.D. 227 (D. Ct. Pa. 1972) where the Court permitted intervention of parties who were among those who had filed the complaints which had generated the litigation. See also, *Donaldson v. U.S.*, 91 S. Ct. 534 (1971); *Dowdy v. Hawfield*, 189 F.2d 637 (D.C. Cir. 1951) *cert. denied*, 72 S. Ct. 54; *American Jerex v. Universal Aluminum Extrusions*, 340 F. Supp. 524 (D. Ct. NY 1972); see also, *EEOC v. AT&T Co.*, 365 F. Supp. 1105 (E.D. Pa. 1973), *affirmed in part, dismissed in part*, 506 F. 2d 735 (3 Cir. 1974).[9]

Thus the intervention question posed by this case and

8. Inasmuch as the charges upon which *NOW v. Bethlehem Steel*, Civ. No. M-74-377 (D. Ct. Md., pending) is based, were filed with EEOC in 1973, fully investigated and determined meritorious in 1974, it can reasonably be assumed that such charges were among those which generated the industry-wide settlement discussions which resulted in the consent decrees.

9. In *AT&T*, the organization representing the aggrieved employees was allowed to intervene at least to the extent of the charge filed with the EEOC. Unlike *AT&T* where the intervenor-applicant had been requested to participate "time and time again" in the negotiations which led up to the consent decree and had "defiantly" rejected participation, here NOW had persistently attempted to participate and had been summarily denied the right to do so. [365 F. Supp. at 1127].

The Court below attempted to distinguish the *AT&T* case on the grounds that it was a case brought pursuant to Sec. 706, not Sec. 707. However, as shown above, such distinction does not stand up to logical analysis inasmuch as the intervenor obviously would have even more interest in participating in a pattern and practice case than in a case of narrower scope and thus lesser impact on the interests intervenor seeks to represent.

erroneously decided by the Court below involves a fundamental interpretation of Title VII and the applicability thereto of Rule 24, F.R.C.P. and is of far reaching importance to the future of the civil rights movement. For, allowed to stand, the decision of the Fifth Circuit herein could foreclose the ability of individuals affected by government-negotiated decrees to have an effective voice in the process of remedying employment discrimination and seriously jeopardize full enforcement of all of the rights guaranteed by the Act and by the U.S. Constitution.[10]

**B. The Waiver Question**

Petitioners have been advised that Intervenor-Appellants in the court below, Sidney S. Harris, *et. al.*, intend to file a petition for writ of certiorari on the issue of the validity of the waivers contemplated by consent decree I.[11] Inasmuch as petitioners in the court below espoused the same legal positions in respect to this issue as did the Harris Appellants, rather than burden this Court with potentially duplicative argument, we wish merely to subscribe to the positions contained in the Harris petition and to incorporate such positions herein as if set forth *in haec verba*.

**C. The Inadequacies of the Consent Decrees**

Evidence before the courts below[12] established that the underrepresentation of women in the steel industry is a result of systemic efforts in the mid-1940's to rid the indus-

10. As we show below, the lower Court's belief that the decrees do not impair or impede individual rights because individuals retain a right of private action is unbelievably naive in view of the overwhelming preponderance of resources accumulated against such individuals as a result of the decree requirement that the government take the side of the discriminators in any such separate litigation (App. A-4).

11. The Harris petition is also due January 15, 1976.

12. Petitioners introduced affidavits of former employee Lessie Fix.

BLEED THROUGH

try of females employed therein during World War II and thereafter to exclude women by a ban on hiring. Despite the statistical absence of women from employment, or at best, tokenism by virtue of recent hiring, the government negotiated a settlement which did nothing to redress the effects of the past discriminatory discharges and hiring bans. Thus the decrees are internally defective inasmuch as they perpetuate such sex discrimination and fail to correct its past effects, contrary to this Court's mandate in *Albemarle Pape Co. v. Moody*, 422 U.S. 405, 412, 95 S. Ct. 2362, 44 L.Ed. 2d .... (1975).[13]

Moreover, consent decree II compounds the effects of the past discriminatory discharges by basing promotion

13. In *Moody* and its predecessors, this Court and the lower courts have recognized that an employer's history of discrimination, such as that extant in the steel industry, has the effect of deterring employees from seeking better employment positions and thus requires that the appropriate remedies account for the realities of entrenched employment discrimination. Clearly, under the *Moody* rationale, it is not sufficient, as the Fifth Circuit suggests, simply to institute prospectively non-discriminatory practices, even assuming such institution occurred as of the effective date of the Act. Employees affected by pre-Act discrimination must be considered and made whole by placing them in positions they would have held but for the discrimination. Thus the decrees herein are deficient in that they take no steps to remedy the present effects of the discrimination practiced against the class of women represented by Petitioners. See also, *Johnson v. Goodyear Tire Co.*, 491 F.2d 1364 (5 Cir. 1974) where the court reached back more than eight years before the effective date of the Act to rectify such historic discrimination and to make whole its victims. Indeed, the instant case is *a fortiori* to *Johnson*, for while that case involved reduced earnings and promotional capacity of individual discriminatee, the instant case represents the unremedied systematic discharge of an entire class of employees. In *U.S. v. Jacksonville Terminal*, 451 F.2d 418 (5 Cir. 1972), *cert. denied*, 406 U.S. 906 (1972), the Appellate Court properly concluded that the government had the right to introduce evidence of pre-Act discrimination dating as far back as the 1930's. Incredibily then, this same Appellate Court in this case condoned the government's failure even to attempt to redress in any fashion the discrimination practiced against the former female employees represented by Petitioners. Such remedial omission is merely one of the numerous egregious defects in the decrees which the courts below erroneously overlooked and condoned.

goals on units in which women are underrepresented as a result of past discrimination. That decree provides that goals and timetables in trade and craft jobs are on the basis of percentage representation in production and maintainance units within the plant or facility. This provision, upheld by the courts below, makes a mockery of any requirement that the steel companies promote females into the trade and craft jobs, inasmuch as women have been historically frozen out of production and maintainance jobs.[14] This inherent defect was pointed out to the courts below but was erroneously rejected as insufficient to invalidate the decrees.[15]

In addition, the transfer provisions do not afford current female employees their rightful place, as required by this Court's rationale in *Moody, supra*. Despite the discriminatory segregation of women employed in the steel industry into clerical and plant security positions, the decree, although purporting to remedy such discrimination, incredibily fails to provide the carryover of seniority and rate retention from those departments to production and maintainance jobs, and even more incredibily nonetheless was approved by the reviewing court.[16] For it is anomolous

14. The court below rejected this argument on the false premise that the hiring goals for p&m would rectify the trade and craft problem. The court's rationale erroneously is premised on the availability of new jobs which, of course, in today's layoff economy is nonexistent. Indeed, any upward movement of of discriminatees has been totally stultified by layoffs and the incumbency of white males in higher positions.

15. See, *Erie Human Relations Commission v. Tullio*, 493 F.2d 371 (2 Cir. 1974), where the court approved a one-to-one ratio to remedy systemic discrimination. Manifestly, insofar as decree II purports to cure the discriminatory exclusion of women from trade and craft jobs by basing promotion goals on production and maintainance units, it is legally inadequate, as the courts below should have held.

16. Indeed, the minimal rate retention provisions fail adequately to protect all current female employees, not just those in office clerical positions. For inasmuch as the steel industry has only recently begun to hire women in any significant, albeit insufficient numbers, most women are not protected by the decretal provisions guaranteeing rate retention only to those employees whose service dates preceed January 1, 1968.

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that the Fifth Circuit would grant its imprimatur to such a woefully insufficient remedy when it has, in the past, considered rate retention and seniority carryover prerequisite to the effective elimination of such segregationist policies. See, eg. *Bing v. Roadway Express, Inc.*, 485 F.2d 441, 450, where the Fifth Circuit said that:

> "the rightful place theory dictates that we give the transferring discriminatee sufficient seniority carryover to permit the advancement [she] would have enjoyed and to give [her] the protection against layoffs [she] would have had in the absence of discrimination. How much seniority the transferee deserves should be determined by the date [she] would have transferred but for [her] employer's discrimination."

Accord: *Wicker v. Hoppock*, 6 Wall. 94, 99, cited by this Court in *Moody, supra* at 418.

Thus clearly the court below erred in approving the decree which failed to contain such a basic remedial guarantee. Indeed, the extent of the court's error in approving the decrees is disclosed by the fact that it fails totally to provide any redress to female discriminatees in office clerical or plant security positions. Nowhere is this more evident than in the back pay provisions. Paragraph 18 C of consent decree I limits those eligible for back pay to the employees in production and maintainance units.[17] And if the date of production and maintenance employment of those few

17. Even if they do not qualify for back pay and thus are not required to execute a waiver, all present female employees are bound by the injunctive provisions of the decrees insofar as they purport to remedy past discrimination and thus are nonetheless frozen into less favorable circumstances than they would be absent the all-encompassing injunctive relief, compliance with the decree constitutes compliance with Title VII provisions. See esp. App. A-17, where the court stated its interpretation of the decree's impact on this matter:

> "injunctive relief provided by the consent decrees extends to all affected steelworkers, regardless whether they elect to accept the back pay and execute the releases."

women who have finally managed to overcome the discriminatory hurdles thereto does not preceed January 1, 1968, such women are not even guaranteed the miniscule minimum of $250 provided by that decree.[18]

The foregoing defects in the decree, plus numerous others equally as egregious and counterproductive to the elimination of discrimination in the steel industry were overlooked or brushed aside by the courts below in their respective zeal to execute and affirm the valadity of the woefully deficient decrees.[19]

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18. See: *Meatcutters v. Safeway Stores.* ... F. Supp. ..., 4 FEP Cases 510-511 (D. Ct. Kan. 1972), where the court rejected as "neither fair nor reasonable, and grossly inadequate" a wage settlement approximating 50% of unpaid wages due—a percentage far greater than the formula devised herein, which falls far short of making steel employees whole for years of discrimination.

19. The issues discussed herein are not intended to be exhaustive of the multitudinous defects in the decrees, but merely to exemplify the error committed by the courts below in approving them. For example, the procedural scheme established by consent decree I also perpetuates discrimination in that it vest virtual sole authority in the hands of the discriminators who predominate on the Audit and Review Committee and on the Implementation Committees. Despite the presumptive bias of such committees, that decree abrogates the authority of governmental compliance agencies to pursue compliance with Title VII and state FEP acts and vests sole authority in these committees.

Moreover, the decree may be a substantial impediment to pursuit of private litigation in that it provides for transfer of such litigation to the District Court for Northern Alabama. Insofar as this provision in consent decree I may require private plaintiffs to litigate in a forum *non conviens*, in some cases geographically remote from homes, places of business, it will work further hardship on litigants already burdened by the awesome task of suing the behemoth steel corporations with their enormous resources. Compounding that imbalance, the decree approved by the courts below now adds the additionally vast resources of the federal government to the side of those accused of violating federal law. Consequently, it is simply incredible, that the Fifth Circuit consistently relied, both in its denial of intervention and its affirmance of the decrees, upon the totally spurious suggestion that the decrees do not, "as a practical matter, operate to impair or impede the protection of [the interests of those represented by petitioners]" (App. A-13).

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## CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court issue its writ of certiorari to review the decision below.

Respectfully submitted,

JUDITH LONNQUIST
*Counsel for Petitioners*

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**UNITED STATES of America et al., Plaintiffs-Appellees,**

**v.**

**ALLEGHENY-LUDLUM INDUSTRIES, INC., et al., Defendants-Appellees,**

**Sidney S. Harris, et al., Intervenors-Appellants,**

**National Organization For Women, Inc., et al., Movants-Appellants.**

**No. 74-3056.**

United States Court of Appeals, Fifth Circuit.

Aug. 18, 1975.

The Equal Employment Opportunity Commission and Secretary of Labor brought action against nine steel companies alleging patterns and practices of hiring and job assignment discrimination on basis of race, sex and national origin and seeking to enforce the edicts of title VII and executive order. After consent decrees were entered, three organizations, four individuals and six groups of plaintiffs moved to intervene and to vacate the decrees. The United States District Court for the District of Alabama, Northern Division, Sam C. Pointer, Jr., J., 63 F.R.D. 1, granted intervention to certain movants and denied intervention to others, refused to vacate the decrees and appeals were taken. The Court of Appeals, Thornberry, Circuit Judge, held that women's feminist organization enjoyed no unconditional statutory right to intervene, and no abuse of discretion was shown in denial of permissive intervention by the organization; that provisions in consent decrees requiring each employee to execute release in order to receive back pay did not provide for release of prospective rights and was not against public policy; that provisions of decrees relating to the mechanics and procedures of ongoing enforcement did not constitute an unlawful abdication of responsibilities by agencies of government; that the mechanics of information compilation and production established by the decrees were sufficient to insure adequate judicial supervision; and that decrees would not be invalidated on ground that interested private parties and their counsel were not invited to participate in predecree negotiations.

Affirmed.

* * *

THORNBERRY, Circuit Judge:

These appeals present novel and important issues which require us to consider the scope of the federal government's authority to encourage and negotiate expeditious and efficient settlement of widespread charges of employment discrimination in the nation's steel industry. Some of these issues are procedural in nature; others call into question the substantive legality of the means utilized. Some issues are ripe for decision; others are essentially hypothetical and conjectural. During the interim between the oral argument of these appeals in December, 1974 and the present, we have carefully examined the attacks which have been advanced against the settlement. Our conclusion is that the settlement has not been shown to be in any respect unlawful or improper, and hence its terms, conditions, and benefits must go forward immediately in their entirety.

## I. INTRODUCTION AND BACKGROUND

On April 12, 1974, a complaint was filed in the federal district court for the Northern District of Alabama. The plaintiffs were the United States, on behalf of the Secretary of Labor, and the Equal Employment Opportunity Commission. Nine major steel companies,[1] and the United Steelworkers of America were named as defendants. The suit involved some 240-250 plants at which more than 300,000 persons are employed, over one-fifth of whom are black, Latin American, or female. Alleging massive patterns and practices of hiring and job assignment discrimination on the basis

of race, sex, and national origin, the complaint sought to enforce the edicts of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, and contractual obligations under Executive Order 11246, as amended, 3 C.F.R. 169 *et seq.* (1974).

The complaint charged that the companies had violated Title VII and Executive Order 11246 by hiring and assigning employees on impermissible grounds, and by restricting ethnic minorities and females to low-paying and undesirable jobs with scant opportunities for advancement. The complaint also charged the companies and the union with formulating collective bargaining contracts which established seniority systems for promotion, layoff, recall, and transfer so as to deprive minority and female employees of opportunities for advancement comparable to those enjoyed by white males.

The filing of the complaint culminated more than six months of intensive, hard-fought negotiations between, on one side, the EEOCC and Departments of Justice and Labor, and on the other the companies and the union. Simultaneously with the filing of the complaint, the parties announced to the court that a tentative nationwide settlement had been reached. The parties multilaterally reduced their agreement to the form of two extensive written consent decrees. Describing the decrees as "a thoughtful and earnest attempt to respond to—and to reconcile competition between—charges of employment discrimination made on behalf of black, female, and Spanish surnamed workers and applicants,"[2] District Judge Pointer signed and entered the documents later that same day.[3]

Consent Decree I is aimed at the practices of the union as well as those of the steel companies. It permanently enjoins the defendants from "discriminating in any aspect of employment on the basis of race, color, sex or national origin and from failing or refusing to fully implement" the substantive relief set forth therein. The items covered by Consent Decree I are mainly matters historically encompassed by collective bargaining. The substantive relief falls into three basic categories: (1) immediate implementation of broad plantwide seniority, along with transfer and testing reforms, and adoption of ongoing mechanisms for further reforms of seniority, departmental, and line of progression (LOP) structures, all of which are designed to correct the continuing effects of past discriminatory assignments; (2) establishment of goals and timetables for fuller utilization of females and minorities in occupations and job categories from which they were discriminatorily excluded in the past; and (3) a back pay fund of $30,940,000, to be paid to minority and female employees injured by the unlawful practices alleged in the complaint.[4]

1. The companies are Allegheny-Ludlum Industries, Inc., Armco Steel Corporation, Bethlehem Steel Corporation, Jones and Laughlin Steel Corporation, National Steel Corporation, Republic Steel Corporation, United States Steel Corporation, Wheeling-Pitsburgh Steel Corporation, and Youngstown Sheet & Tube Company. According to one estimate, the complaint reached seventy-three percent of the country's basic steel industry. Brief for the appellee steel companies at 3 n. 2.

2. *See* United States v. Allegheny-Ludlum Indus., Inc., N.D.Ala. 1974, 63 F.R.D. 1, 3.

3. The two consent decrees are reprinted in BNA FEP Manual 431:125-152 (1974). The correct entry date, as reflected in the record, is April 12, 1974, rather than April 15.

4. Paragraph 18(c) of Consent Decree I defines as the affected classes of employees eligible to receive back pay: (1) minority (black and Spanish-American surnamed) employees in Production and Maintenance units who were employed prior to January 1, 1968; (2) all females in Production and Maintenance units as of the date of decree entry; and (3) those former employees who retired on pension within the two years preceding entry of the decrees, who, if they were still employed, would be within group (1) or group (2). Provision is also made for payment of back pay to surviving spouses of otherwise eligible deceased employees.

BLEED THROUGH

Consent Decree II and its accompanying Agreement deal with aspects of employment which are mainly company-controlled and thus not subject to collective bargaining. The companies again are broadly enjoined from any form of unlawful employment discrimination. Also, Consent Decree II requires the companies to initiate affirmative action programs in hiring, initial assignments, promotions, management training, and recruitment of minorities and females.

The decrees must be made to function in varying and peculiar situations in accordance with the parties' ambitious objectives. Furthermore, the parties contemplated that unforeseen interpretive issues will inevitably arise and require resolution. With these considerations in mind, the decrees provide for the establishment of implementation and enforcement procedures through a system of Implementation Committees. These committees are established at each major plant to which the decrees are made applicable. Each committee includes at least two union representatives, one of whom is a member of the largest minority group in the plant,[5] and an equal number of company members. The government is entitled to designate a representative to meet with any Implementation Committee. The Implementation Committees are charged with assuring compliance with Consent Decree I, including changes in local seniority rules and LOPs, as well as the establishment of goals and timetables for affirmative action under paragraph 10. In addition, it is the Implementation Committees' responsibility to furnish employees with information about their rights under the settlement.

The Audit and Review Committee, established under paragraph 13 of Consent Decree I, is the hub mechanism in the decree's system of continuing review, enforcement and compliance. It is composed on an industry-wide basis of five management members, five union members, and one government member. It meets regularly to oversee compliance with the decrees and to resolve disputes which come before it, including any questions that the Implementation Committees have been unable to resolve. Matters which the Audit and Review Committee cannot resolve unanimously may be brought before the district court. Furthermore, all parties to the decrees have stipulated on the record that paragraph 20 of Consent Decree I, which vests the district court with continuing jurisdiction for at least five years, permits the court to review fully and, if necessary, correct any action taken pursuant to the decrees, irrespective of whether a party requests such review. Beginning no later than December 31, 1975, the Audit and Review Committee will review the entire experience under Consent Decree I. The committee may then propose remedial steps at any plant in order to overcome deficiencies in either the decree or its results. If the government representative remains dissatisfied with a committee proposal, he may take the matter to the district court. Finally, the Audit and Review Committee is responsible at least annually for reviews of the various Implementation Committees' performance in establishing and fulfilling affirmative action goals in job assignment, hiring, promotion and seniority, and minority-female recruitment.

As the district court correctly determined, neither decree purports "to bind any individual employee or to prevent the institution or maintenance of private litigation."[6] At the time of the decrees' entry, hundreds of employment discrimination charges were pending against the defendants before the EEOC and federal district courts scattered throughout the country. Between twenty and sixty thousand minority and female individuals then stood beneath the overlapping umbrellas of these charges as members

5. Paragraph 12 of Consent Decree I provides for a second minority member at plants in which at least ten percent of the employees comprise a second minority group, unless one of the union representatives is already from that minority group.

6. 63 F.R.D. at 4.

of putative aggrieved classes in actions seeking systemic injunctive relief and back pay. Thousands still do, and the problems of administrative and judicial management are truly awesome.[7] The consent decrees establish a formula for expeditious and coordinated resolution of the multitude of pending charges. With respect to pending cases in which district courts have already entered remedial decrees, the government, companies, and union have agreed to petition those courts for amendments to conform their relief to that contained in the consent decrees. The same action is being taken with respect to orders of the Secretary of Labor, rendered pursuant to Executive Order 11246, which were issued prior to entry of the decrees. In regard to other pending litigation, the parties to the consent decrees have agreed that release forms and notices to employees pursuant to subparagraphs 18(g) and (h) of Consent Decree I shall be forwarded to the courts trying the private actions, as well as to Judge Pointer for approval prior to distribution to all other affected employees. The parties have agreed on the record that they will observe any order or instruction issued by any of these courts. Audit and Review Committee Directive No. 1, ¶ 5, May 31, 1974.

Under introductory paragraph C of each decree, the government has stipulated that in future cases involving private claims for relief, *other than back pay*, which would be inconsistent with the systemic relief provided by the decrees the government will suggest to the forum court that the relief sought is unwarranted in the separate proceeding. The government, however, may proceed through the Audit and Review Committee mechanism to recommend that matters raised in the separate proceeding be submitted to Judge Pointer for resolution within the framework of the consent decrees. The government concedes, of course, and no one seriously argues contrariwise, that no forum court will be

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7. A revealing illustration is the purported class action involving United States Steel's Fairfield Works in Alabama, now pending on appeal before this court, No. 73-3907, Ford, et al. v. United States Steel Corp., et al., partially reported below at 371 F.Supp. 1045 (N.D.Ala. 1973). Approximately 12,000 people are employed at Fairfield Works, around 3,100 of whom are black. Between six and eight private class actions were consolidated for trial. Back pay was awarded to some members of three classes, but denied as to the other classes. A total of sixty-one people, or thirteen percent of the members of the certified private classes, received back pay awards. The other eighty-seven percent, or 403 blacks, were denied back pay. Nonetheless, in anticipation of the appeal, the district court on May 2, 1973 amended the class certification order to redefine the plaintiff class as: (1) all blacks, except those already members of a private class whose rights had been adjudicated, who had been employed at Fairfield Works at any time prior to January 1, 1973; and (2) all blacks who had unsuccessfully sought employment at Fairfield Works prior to January 1, 1973. Although we have no reliable estimate on the combined size of the resulting class, subclass (1) alone is sufficiently large to have encouraged the defendants to enter into consent decrees with the government, in which $30.9 million is promised in back pay, "several million dollars" of which represents United States Steel's allotment, principally for blacks, but also for female and Spanish-surnamed workers at Fairfield Works. Brief for Appellee United States Steel Corp., at 7, No. 73-3907, Ford, et al. v. United States Steel Corp., et al.

The Fairfield Works case also involved pattern or practice charges brought by the United States, resulting in an appeal by the government from denied of certain injunctive relief and denial of back pay to black employees who were not represented in the private class actions. Since the government is now admittedly satisfied with the rate retention and back pay provisions of subsequently-negotiated Consent Decree I, paragraphs 8 and 18 thereof respectively, it has withdrawn its appeal in *Ford* pending our decision as to the validity of the consent decrees *sub judice*. Stipulation of the Parties, filed July 8, 1974.

Last, but not least, in an Order filed December 23, 1974, Judge Pointer entered an unopposed amendment in *Ford* conforming the injunctive relief for Fairfield Works to that provided by the consent decrees, in all minimum respects except back pay. Since the issue of classwide back pay is still on appeal to this court in *Ford*, Judge Pointer ordered postponement of further back pay availability in that case until final decision of the appeals in *Ford* and in this case.

BLEED THROUGH

legally obliged to follow any government recommendation of dismissal, stay, or transfer as to any separate suit filed in such court.

With respect to charges pending at the administrative level at the time of the decrees' entry, the EEOC has agreed in paragraph 19 to expedite its processing schedule. The Commission will first identify those charges that allege violations for which the appropriate remedies are wholly within the scope of the decrees. In those cases, the EEOC will consider the charges settled and so notify the charging party. In addition, it will recommend to the charging party that he or she accept the back pay provided under paragraph 18(c) of Consent Decree I. As discussed, *infra*, the charging party is free to reject the EEOC's recommendation and commence a private suit for greater back pay or any other relief. As for pending charges that relate to matters which are not wholly within the scope of the decrees, the Commission will conduct the usual investigations and attempt to conciliate the charges. In all such cases, the time in which a charging party must decide whether to claim the back pay under paragraph 18 will be suspended during the administrative proceedings.

The overriding goal of the United States, the Secretary of Labor, the EEOC, the companies, and the union is comprehensive, final and fair settlement of charges of unlawful employment discrimination arising from patterns and practices alleged upon the part of the companies and the union up to and including the entry date of the consent decrees. Accordingly, introductory paragraph C of each decree provides for binding resolution, between and among the parties to the decrees, of all issues treated by the decrees, together with all issues which may arise as future effects of the resolved pre-decree discriminations. To the extent the defendants maintain compliance with the decrees as to issues covered and which through the various procedures may become covered thereby, the government has agreed that it shall deem the defendants to have complied with Title VII and Executive Order 11246.[8] As to matters which originate in discriminations occurring prior to and including the entry date, and which are covered by the complaint or the decrees, the settlement is *res judicata* between and among its signatories.

Two important factors, however, warrant clarification at this point. First, no private individual, as such, is a party to the consent decrees. Thus, the consent decrees do not seek by their terms to bind private individuals by way of res judicata or estoppel by judgment. It is only through the acceptance of the back pay and legally effective execution of the release contemplated by paragraph 18(g) of Consent Decree I that a private individual can compromise, by virtue of the decrees, any right that he may have. Apart from the $30,940,000 back pay fund, paragraphs 17 and 18 establish mandatory procedures for fully informing private parties of their rights. Paragraph 18 sets up specific guidelines and standards for computing and delivering back pay awards to electing employees. The Implementation Committees, the Audit and Review Committee, and ultimately the district court bear the critical responsibility to insure that individual employees have the opportunity to make free, intelligent decisions whether to accept the back pay under the consent decrees.

The second factor relates to the nature of the consent decrees' finality as contemplated by paragraph C. In that paragraph, the plaintiffs United States, the Secretary of Labor, and the EEOC have stated in so many words that they consider the decrees remedially adequate to bring the defendants into present compliance with federal anti-discrimination law and to compensate individual employees for the past and continuing effects of the alleged discriminatory

8. Paragraph 16 of Consent Decree I contains a corresponding stipulation on behalf of the Secretary of Labor and the Office of Federal Contract Compliance.

practices which the decrees enjoin. Because the plaintiffs believe that the decrees are sufficient to those purposes, they have stipulated that the decrees are *res judicata* with respect to all legal, factual, and remedial issues within the scope of the complaint and the decrees. In other words, the plaintiffs—and we take the parties at their word at oral argument—have merely consented to proceed within the mechanics of the decrees in lieu of filing additional judgments against the defendants with respect to matters covered by the decrees.

Also because they believe that the decrees provide adequate relief, the plaintiffs have agreed that compliance with the decrees shall be deemed compliance with Title VII and Executive Order 11246. Nonetheless, it is our understanding of the submission to this court on behalf of all parties to the decrees that the government remains entirely free, from and after the date of entry, to police the implementation of the decrees for repeated or new violations of the injunctive provisions, and furthermore that the government shall be entitled to treat such suspected violations as *new* violations of Title VII and/or Executive Order 11246, by reason of which the government shall not be barred from bringing the matter to the attention of the district court for new injunctive correction, if necessary. Correspondingly, in light of the parties' stipulation as to the scope of the district court's continuing jurisdiction, we construe paragraph 20 of Consent Decree I as authorizing any aggrieved individual to proceed in similar fashion. If the grievance arises from a transaction or episode to which the injunctive provisions of the decrees apply, then we understand that the individual may approach the court directly.[9] If the grievance involves an allegation of new discrimination occurring subsequent to entry date, then it is our understanding that the individual may file a charge with the EEOC, and/or a lawsuit if he or she chooses, and expect the same quality of administrative and judicial consideration to which an employment discrimination complainant would be entitled in any other American industry.

Having sketched—by no means exhaustively—the terms of the settlement, the parties' interpretation thereof, and our general understanding of what the parties intended by their words and deeds, we turn now to the adversary environment which produced these appeals.

## II. PRIVATE INTERVENTION: COMPLAINTS, PROCEEDINGS, AND APPEALS

The consent decrees were entered on April 12, 1974. By May 17, 1974, three organizations, four individuals, and six groups[10] of plaintiffs in actions pending

9. Of course, the parties to the decrees will encourage the grievant to proceed initially through Implementation and Audit and Review Committee channels, if the grievant seeks systemic relief. Also, that procedure obviously will be the most viable alternative for employees who reside at a distance from the Northern District of Alabama. Yet the decrees themselves—and particularly paragraph 20 of Consent Decree I, see also paragraph 2 of Consent Decree II—are open-ended in that they do not purport to impose administrative exhaustion requirements upon the individual in excess of those otherwise imposed by law. Thus, it is quite reasonable to infer that any obstacles which the individual may encounter en route to any given courthouse must arise by virtue of rules of law or compromises that exist independently of the bare terms of the consent decrees. In any event, with respect to questions concerning any matter resolved by the decrees, the parties thereto have stipulated that the district court may assume jurisdiction on its own motion. Hence, the decrees do not by their own force attempt to inhibit anyone's access to judicial process or the availability of judicial review.

10. The Harris group, certain members of which are the principal appellants herein, consists of seven sub-groups, the first of which claims to represent all black employees, past, present, and future, of all defendant companies at plants in which the Steelworkers' Union is the employees' bargaining representative. The next six subgroups claim to represent six private classes in pending actions: Harris, et al. v. Republic Steel Corp., et al., N.D.Ala., C.A. No. 74—P-3345: Ford, et al. v. United States Steel Corp., et al., N.D.Ala., C.A.No. 66-

BLEED THROUGH

before various district courts had moved to intervene and to vacate the decrees. The district court invited the movants to file briefs, offer proof, and make oral arguments at the hearing conducted on May 20. At the conclusion of the hearing, the court narrowed the issues in intervention to two points: (1) whether the decrees should be stayed or vacated as unlawful or improper in their entirety; and (2) the validity of the contemplated releases of claims for additional relief in connection with the payment of back pay to employees so electing under the consent decrees.

The district court granted intervention as of right, intendedly pursuant to § 706(f)(1) of Title VII, 42 U.S.C. § 2000e-5(f)(1), and F.R.Civ.P. 24(a)(1), to a group of thirty-six individuals with respect to whom charges of discrimination on the part of the defendants had been filed with the EEOC. Thirty-three of these individuals were members of the Harris group. The court also granted permissive intervention under F.R.Civ.P. 24(b) to the principal officer of the Rank and File Team, an organization composed of rank and file members of the Steelworkers' Union. Judge Pointer denied all other motions for intervention, including that filed by the National Organization of Women (NOW), appellant herein. Among the thirty-six persons as to whom the court allowed intervention by right, however, three were women specifically appointed by NOW at Judge Pointer's request, and represented by NOW's counsel through out the proceedings.[11]

In his memorandum opinion of June 7, 1974, *see* 63 F.R.D. 1, 5, Judge Pointer refused to stay or vacate the consent decrees and upheld their validity against the intervenors' attacks. He determined first that no evidentiary hearing was needed, since the intervenors sought mainly to present legal hypotheses and argument rather than evidence. Next, the court rejected contentions that the government had abdicated or bargained away its responsibilities under Title VII and Executive Order 11246. While recognizing that the decrees may require authoritative construction and clarification from time to time, Judge Pointer deemed such potential difficulties within his control by virtue of the court's continuing jurisdiction. With respect to the alleged illegality of the back pay settlement releases, Judge Pointer defined the issue as "whether a signed release in exchange for the payment of back-pay determined under a settlement procedure, as contemplated in paragraph 18(g) of Consent Decree I, can be valid as a matter of public policy." *Id.* at 7. Relying on recent language by the Supreme Court,[12] he held in the affirmative, provided the employee's consent is both " 'voluntary and knowing,' " with "adequate notice which gives the employee full possession of the facts." *Id.*

As a procedural matter, Judge Pointer also relaxed his earlier orders denying intervention to the majority of the movants. The final memorandum of June 7 denies such intervention without prejudice to the rights of private parties to seek further intervention as to questions which may arise in the future. Similarly, whereas Judge Pointer considered his opinion binding upon those to whom he granted intervention as to the issues therein determined, he stated explicitly that he did not consider any private in-

625, *see* note 7, *supra;* Taylor, et al. v. Armco Steel Corp. et al., S.D.Tex., C.A.No. 68-129; Waker, et al. v. Republic Steel Corp., et al., N.D.Ala. C.A.Nos. 71-179, 71-180, 71-181, 71-185; Lane, et al. v. Bethlehem Steel Corp., et al., D.Md., C.A.No. 71-580-H; Rodgers, et al. v. United States Steel Corp., et al., W.D.Pa., C.A.No. 71-793.

11. On June 4, 1974, Judge Pointer permitted NOW to file an amended complaint in intervention on behalf of the three women, who represented aggrieved classes of former, present, and future female employees of the defendant steel companies. Judge Pointer also received from NOW extensive briefs concerning the effects of the consent decrees upon the rights of females.

12. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 52 & n. 15, 94 S.Ct. 1011, 1021 & n. 15, 39 L.Ed.2d 147, 160 & n. 15 (1974).

tervenor or class of private parties bound by principles of *res judicata* to the consent decrees. *Id.* at 4 n. 2, 5.

[1] NOW appeals the district court's refusal to allow intervention by the organization *qua* organization. It has also filed a brief and presented oral argument on the merits in behalf of the three female appellants to whom Judge Pointer granted intervention. The intervenors from the Harris group appeal the district court's judgment sustaining the overall legality of the consent decrees, although they complain primarily about the back pay features rather than the decrees' injunctive provisions. No other appeals are properly before this court.[13]

For the reasons which follow, we affirm the judgment of the district court insofar as it rejected the contentions of the Harris intervenors and the three females nominated by NOW. We dismiss the appeal of NOW *qua* organization for want of jurisdiction.

## III. DENIAL OF NOW'S MOTION TO INTERVENE

Logical analysis of any question concerning intervention in federal court begins with Rule 24 of the Federal Rules of Civil Procedure.[14] The rule establishes ground rules for two categories of intervention: section (a) establishes the procedures for timely intervention as of right, whereas section (b) recognizes discretion in the district court to permit intervention in two specified situations, again upon timely application.

[2-4] Besides timeliness, Rule 24 details other preconditions to intervention.

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13. The record reflects that attorneys for the Harris group also listed the National Ad Hoc Committee of Steelworkers, as to which the district court denied intervention, in the Harris intervenors' Notice of Appeal. On appeal, however, the Ad Hoc Committee has filed only a brief as Amicus Curiae, joined by the District 31 Committee to Defend the Right to Strike along with the Rank and File Team. Of the issues briefed by Amici, only those relating to the alleged illegality of the back pay releases have been presented to this court by the briefs of NOW, the three women represented by NOW, and the Harris intervenors. The other issues briefed by Amici were not raised in the district court, and for that reason we shall not consider them. *Cf.* Wisconsin Barge Line, Inc. v. Coastal Marine Transport, Inc., 5 Cir. 1969, 414 F.2d 872, 876, and cases cited.

14. Rule 24.

Intervention

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C., § 2403.

As amended Dec. 27, 1946, eff. March 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966.

BLEED THROUGH

Under section (a), intervention as of right is authorized (1) when an act of Congress confers an unconditional right to intervene, or (2) when the applicant claims an interest in the subject matter of the action and shows that the action's disposition may, as a practical matter, impair or impede the ability to protect that interest, unless the applicant's interest is adequately protected by other parties to the suit. Thus, (a)(1) intervention presupposes reliance on a statute. By contrast, the inquiry under subsection (a)(2) is a flexible one, which focuses on the particular facts and circumstances surrounding each application. Since 1966, we have consistently held that (a)(2) intervention as of right must be measured by a practical rather than technical yardstick. *E. g.*, Martin v. Travelers Indem. Co., 5 Cir. 1971, 450 F.2d 542, 554; Diaz v. Southern Drilling Corp., 5 Cir. 1970, 427 F.2d 1118, 1123-25, *cert. denied sub nom.*, Trefina A.G. v. United States, 400 U.S. 878, 91 S.Ct. 118, 27 L.Ed.2d 115 (1970); Atlantis Development Corp. v. United States, 5 Cir. 1967, 379 F.2d 818, 822-29. A denial of an application for intervention by right which was timely filed, as here, is subject to the usual scope of our appellate review over questions of law. An erroneous denial will be reversed. Weiser v. White, 5 Cir. 1975, 505 F.2d 912, at p. 916. On the other hand, if the appellate court finds that the claim of right to intervene was without merit, then it must dismiss the appeal for want of jurisdiction, since the order denying intervention does not constitute a final judgment. *Id. See also* C. Wright, Federal Courts § 75, at 332 (1970).

[5, 6] The rules pertaining to permissive intervention are slightly different. Rule 24(b) authorizes permissive intervention (1) when a federal statute confers a conditional right to intervene, or (2) when the application raises a question of law or fact which is material to the main action. In exercising its discretion, the district court is required to consider whether permissive intervention would unduly jeopardize or delay the determination of the original suit. On appeal, the denial of a motion for permissive intervention is unreviewable, unless the trial court abused its discretion, Brotherhood of R. R. Trainmen v. Baltimore & Ohio R. R. 331 U.S. 519, 524, 67 S.Ct. 1387, 1390, 91 L.Ed. 1646, 1650 (1947); Martin v. Kalvar Corp., 5 Cir. 1969, 411 F.2d 552. If no abuse of discretion is demonstrated, then once again the district court's order is not appealable and we must dismiss the appeal for want of a final order. Weiser v. White, *supra;* C. Wright, *supra.*

NOW's principal contention asserts an absolute, unconditional right of intervention in favor of the organization. NOW thus seeks to enter the lawsuit under Rule 24(a)(1). NOW argues that this absolute, unconditional right is conferred upon it by § 706(f)(1) of Title VII, as amended, Pub.L.No.92-261, § 4(a) (March 24, 1972), 42 U.S.C. § 2000e-5(f)(1). Section 706(f)(1), which, as pertinent, contains the procedures for filing charges with the EEOC and the filing of lawsuits by the Commission or charging parties when conciliation fails, confers upon the "person or persons aggrieved" a right to intervene in a civil action brought thereunder by the Commission. NOW contends that since it is a civil rights-oriented feminist organization which has been permitted on occasions to file charges with the EEOC on behalf of women, and since on at least one occasion it has been named as a party-plaintiff in a sex discrimination lawsuit,[15] it should therefore be deemed a "person aggrieved" in its own stead. NOW argues that judicial recognition of an unconditional organizational right of

15. NOW informs us that is it one of the plaintiffs in a class action employment discrimination suit pending before the federal district court in Maryland, styled Baltimore Chapter of NOW; Cathleen J. Beasley and Catherine N. Lloyd v. Bethlehem Steel Corp., et al., No. M-74-377. Brief for Appellants NOW, et al., at 6. NOW asserts that its filing of charges with the EEOC, for example on behalf of all female employees of United States Steel at Gary, Indiana (Charge No. TCH 4-1985, filed March, 1974), has been instrumental in generating a favorable climate for conciliation and settlement in the steel industry.

intervention would yield socially desirable results, since the organization would receive valuable stature and publicity which would encourage female workers throughout the nation to seek its assistance.

Without drawing any finer distinctions, the district court held that NOW is not a "person aggrieved" within the meaning of §706(f)(1). In the court's view, NOW did not demonstrate a sufficiently concrete interest *qua* organization to justify the additional problems of management and inconvenience to other parties (including, presumably, the beneficiary employees of the consent decrees) that might result from duplicative intervention. The fact that NOW previously had been permitted to designate three female intervenors, whom its counsel ably represented, weighed heavily in Judge Pointer's calculus. See 63 F.R.D. at 4.

[7] While perhaps a court might be persuaded by Judge Pointer's conclusion that NOW is not a "person aggrieved" within the meaning of § 706(f)(1),[16] we defer decision of that question in favor of an approach which we consider more directly dispositive. We hold that this was not a proper case for intervention as of right by any private party or organization pursuant to Rule 24(a)(1). Specifically, we hold that intervention as of right was not conferred in this proceeding by any act of Congress. We do so because it is plain from a careful examination of the government's complaint that this was not in substance a § 706 action, but rather a "pattern or practice" action authorized by § 707, 42 U.S.C. § 2000e-6, which the EEOC was empowered to institute by virtue of the transfer of functions outlined in § 707(c).[17] Insofar as the United States and the Secretary of Labor joined as plaintiffs to enforce the obligations imposed on the defendants by Executive Order 11246, the district court's jurisdiction was based on 28 U.S.C. § 1345.[18]

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16. *Cf.* Sierra Club v. Morton, 405 U.S. 727, 740, 92 S.Ct. 1361, 1368-69, 31 L.Ed.2d 636, 646 (1972):

> The requirement that a party seeking review must allege facts showing that he is himself adversely affected does not insulate executive action from judicial review, nor does it prevent any public interests from being protected through the judicial process. It does serve as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome. That goal would be undermined were we to construe the APA to authorize judicial review at the behest of organizations or individuals who seek to do no more than vindicate their own value preferences through the judicial process. The principle that the Sierra Club would have us establish in this case would do just that.

(footnotes omitted).

*But see* Warth v. Seldin, ..... U.S. ....., ....., 95 S.Ct. 2197, 2211, 44 L.Ed.2d ..... (1975):

> There is no question that an association may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy. Moreover, in attempting to secure relief from injury to itself the association may assert the rights of its members, at least so long as the challenged infractions adversely affect its members' associational ties.

In *Warth* the Court described the question of standing as essentially a matter of "whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." ..... U.S. at ....., 95 S.Ct. at 2207 (footnote omitted). Note that whereas § 706(f)(1) of Title VII creates civil actions and rights of intervention in favor of "Person[s] aggrieved," § 703, 42 U.S.C. § 2000e-2, makes it unlawful to discriminate against "any *individual*." (emphasis added).

17. As of March 24, 1974, the EEOC assumed the full range of "pattern or practice" functions which had belonged to the Justice Department since the effective date of Title VII, July 2, 1965. Accordingly, NOW appears to accept as correct our statement in the text, that this was a § 707 "pattern or practice" action. Brief for Appellants NOW, et al., at 6.

18. 28 U.S.C. § 1345: "Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress." *See* United States v. Local 189, United Papermakers, E.D.La. 1968, 282 F.Supp. 39, 43, *aff'd*, 5 Cir. 1969, 416 F.2d 980, *cert. denied*, 397 U.S. 919, 90 S.Ct. 926, 25 L.Ed.2d 100 (1970).

BLEED THROUGH

[8, 9] Nothing in § 707 or in any other federal statute conferred an unconditional right of intervention upon any private individual or association thereof. The "pattern or practice" action under § 707, which is conspicuously silent in regard to intervention, must be carefully contrasted with the actions contemplated by § 706. Under § 707, the EEOC (formerly the Attorney General) may institute a "pattern or practice" suit anytime that it has "reasonable cause" to believe such a suit necessary. *See* United States v. Jacksonville Terminal Co., 5 Cir. 1971, 451 F.2d 418, 438, *cert. denied*, 406 U.S. 906, 92 S.Ct. 1607, 31 L.Ed.2d 815 (1972). Section 707 does not make it mandatory that anyone file a charge against the employer or follow administrative timetables before the suit may be brought. It was unquestionably the design of Congress in the enactment of § 707 to provide the government with a swift and effective weapon to vindicate the broad public interest in eliminating unlawful practices, at a level which may or may not address the grievances of particular individuals. *See* Rodriguez v. East Texas Motor Freight, 5 Cir. 1974, 505 F.2d 40, at p. 66; United States v. International Ass'n. of Bridge, Structural, and Ornamental Iron Workers, 7 Cir. 1971, 438 F.2d 679, *cert. denied* 404 U.S. 830, 92 S.Ct. 75, 30 L.Ed.2d 60 (1971). Rather, it is to those individual grievances that Congress addressed § 706, with its attendant requirements that charges be filed, investigations conducted, and an opportunity to conciliate afforded the respondent when "reasonable cause" has been found. On the other hand, the mere fact that some charges were filed, or that efforts were made toward conciliation, does not in our view transform what the government may properly bring and does bring as a § 707 "pattern or practice" action into a § 706 action. *See* United States Ironworkers Local 86, 9 Cir. 1971, 443 F.2d 544, 551-52, *cert. denied*, 404 U.S. 984, 92 S.Ct. 447, 30 L.Ed.2d 367 (1971).

We have studied closely the language of the two sections in reaching the foregoing conclusions. If only the words of the statute were available, one might plausibly argue that § 707(e), 42 U.S.C. § 2000e-6(e), incorporates § 706(f)(1) intervention as of right into "pattern or practice" procedure. Section 707(e), enacted as another of the 1972 amendments to Title VII, provides that the EEOC shall have the authority, subsequent to March 24, 1972, "to investigate and act on" charges of pattern or practice discrimination filed in behalf of aggrieved individuals. Section 707(e) concludes: "All such actions shall be conducted in accordance with the procedures set forth in section 2000e-5 [§ 706] of this title."

[10] Arguably, these procedures include intervention as of right by aggrieved parties. The legislative history indicates otherwise, however, and in the absence of an express provision for intervention we choose to follow its signals. In the first place, we have discovered no legislative history evincing a favorable congressional attitude toward unconditional private intervention in government "pattern or practice" litigation. In the legislative history which speaks most closely to the point, the House Committee on Education and Labor described the enacted precursor to § 707(e) as a measure which merely "[a]ssimilate[d] procedures for new proceedings brought under Section 707 to those now provided for under Section 706 so that the Commission may provide an *administrative procedure* to be the counterpart of the present Section 707 action." (emphasis added).[19] Thus, while Congress apparently intended that the EEOC have investigative and conciliatory authority in "pattern or practice" situations comparable to its existing powers in § 706 cases, there is no indication that Congress intended the duplication of procedures to extend beyond the administrative level. The EEOC, of course, may not enact statutes, and it is a statute that Rule 24(a)(1) requires.

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19. H. Rep. No. 92-238, reporting H.R. 1746, 92d Cong., 2d Sess., 1972 U.S.Code Cong. & Admin.News 2137, at 2164 (reporting § 707(f) of H.R. 1746).

[11] We emphasize that our disposition of the 24(a)(1) aspect of the intervention question is based primarily on what we find to be the correct construction of § 707 and its legislative history. We are comforted, however, by the Seventh Circuit's recent decision in EEOC v. United Air Lines, 7 Cir. 1975, 515 F.2d 946, in which the court reached the same conclusion, though ultimately its affirmance was based on the untimeliness of the intervenors' application. Also, we find persuasive support for our refusal to effectively imply an unconditional statutory right in the strong judicial policy against nonexpress private intervention in government enforcement litigation when an adequate private remedy is freely accessible. *See, e.g.*, Sam Fox Publishing Co. v. United States, 366 U.S. 683, 81 S.Ct. 1309, 6 L.Ed.2d 604 (1961). *See also* Battle v. Liberty Nat'l. Life Ins. Co., 5 Cir. 1974, 493 F.2d 39, 52, *cert. denied*, 419 U.S. 1110, 95 S.Ct. 784, 42 L.Ed.2d 807 (1975). This policy likewise applies to applications for intervention by right under Rule 24(a)(2), and applications for permissive intervention under Rule 24(b). *See* SEC v. Everest Mgt. Corp., 2 Cir. 1972, 475 F.2d 1236; United States v. Automobile Mfrs. Assn., C.D. Cal.1969, 307 F.Supp. 617, 619, *aff'd per curiam*, 397 U.S. 243, 90 S.Ct. 1105, 25 L.Ed.2d 280 (1970). *Cf.* NAACP v. New York, 413 U.S. 345, 368, 93 S.Ct. 2591, 2604, 37 L.Ed.2d 648, 664 (1973).

Without any aim on our part to denigrate whatever social benefit may accrue from participation in the proceedings by organizations such as NOW, or to impugn NOW's motives or sincerity, we note that NOW has offered no commanding legal or policy arguments to warrant a rule allowing its intervention as of right. NOW places much reliance on EEOC v. American Tel. & Tel. Co., E.D.Pa. 1973, 365 F.Supp. 1105, *aff'd in part, appeals dismissed in part*, 3 Cir. 1974, 506 F.2d 735. There the court granted intervention by right, under § 706(f)(1) and Rule 24(a)(1), to a labor union insofar as certain issues raised in the union's application related to grievances with respect to which charges had been filed with the EEOC, and to remedy which the Commission had filed a suit that led to an industry-wide consent decree. *American Tel. & Tel.*, however, was a suit brought by the Commission pursuant to § 706. It was not a § 707 "pattern or practice" action. *See* 506 F.2d at 740. The issue before the court was whether the union could be considered an "aggrieved" party for purposes of § 706(f)(1). The case is not authority for the proposition sought to be established *sub judice*. At any rate, we think that a labor union which is party to the collective bargaining agreement presents a far stronger case for intervention than does an organization such as NOW, provided that conflicts of interest are minimized.[20]

[12] In summary, we have determined that NOW enjoyed no unconditional statutory right to intervene under F.R.Civ.P. 24(a)(1). The matter is

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20. A labor union is elected to represent in collective bargaining the employees who depend on the company for their jobs and livelihood. When the company, as in *American Tel. & Tel.*, enters into a settlement with the government in an effort to resolve complaints of alleged employment discrimination, the union derivatively acquires a mandatory duty to negotiate alternatives to the provisions—e.g., those relating to seniority, or as in the Bell case pregnancy leave—of the existing collective bargaining contract. If the settlement contains features the legality or propriety of which is questionable, then the union may have a definite, cognizable interest *qua* union in contesting those features. *Cf.* Kilberg, *Current Civil Rights Problems ii the Collective Bargaining Process: The Bethlehem and AT&T Experiences*, 27 Vand.L.Rev. 81, 101, 106 (1974). Furthermore, the union's ability to protect its interest may well be impaired or impeded if it is not allowed to intervene in the settlement formalization proceedings. *Id.* At the very least, it would be anomalous to assume in such cases that the employees' bargaining representative's interest is adequately served by the government or the employer. Nevertheless, the union must carefully tailor its role in intervention in order not to unduly favor or discriminate against the interests of particular segments of its membership. *See* EEOC v. American Tel. & Tel. Co., 3 Cir. 1974, 506 F.2d 735, 741.

BLEED THROUGH

mostly ended at this point, but we pause briefly to consider whether the district court could have erred in refusing to grant NOW intervention under Rule 24(a)(2) or (b). With respect to (a)(2) intervention as of right, NOW obviously claims an interest in the subject matter of the action. We believe, however, that NOW fails the other two prongs of the test. NOW has not shown that the district court's decision to enter the consent decrees as between the government and the defendants may, as a practical matter, operate to impair or impede the protection of its interest. Neither NOW nor any of its members is bound by *res judicata* or estoppel to the consent decrees. *See* Rodriguez v. East Texas Moto Freight, 5 Cir. 1974, 505 F.2d 40 at p. 65; Williamson v. Bethlehem Steel Corp., 2 Cir. 1972, 468 F.2d 1201, 1203, *cert. denied*, 411 U.S. 931, 93 S.Ct. 1893, 36 L.Ed.2d 390 (1973). *See also* Sam Fox Publishing Co. v. United States, *supra*, 366 U.S. at 689-90, 81 S.Ct. at 1313, 6 L.Ed.2d at 609. Furthermore, the district court explicitly qualified the denial of intervention as a denial *without prejudice* to future intervention. *Cf.* NAACP v. New York, *supra*. Finally, plenary legal remedies remain fully available to NOW's membership and perhaps, or so NOW has asserted, to the organization itself.[21] The policy against private intervention in government litigation, noted *supra*, militates against the allowance of (a)(2) intervention here; NOW makes no colorable showing of inadequacy in the government's representation of the public interest. In any event, NOW fails the third element of the (a)(2) test. Having participated through its nominees and counsel during these entire proceedings, NOW cannot be heard to complain of the adequacy of the feminist representation.

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21. For that reason, NOW's reliance on cases such as Trbovich v. UMW, 404 U.S. 528, 92 S.Ct. 630, 30 L.Ed.2d 686 (1972), is misplaced. *Trbovich* was an action by the Secretary of Labor under § 482(b) of the LMRDA, 29 U.S.C. § 401 *et seq.*, to set aside a union's election of officers because of alleged violations of Title IV of the Act, § 481 *et seq.* The statute provided that the suit by the Secretary constituted the exclusive remedy, and union members are barred by law from bringing private actions. Since the Secretary thus functioned as the union members' only advocate for the protection of their valuable rights against the union, and because the Secretary's corresponding and potentially conflicting duty to consider the broader public interest, the Court held that the union member who filed the original complaint with the Secretary was entitled to limited intervention under Rule 24(a)(2). Here, by contrast, although the government was obliged to represent the public interest, the consent decrees do not purport to affect the availability of relief from employment discrimination through private actions under Title VII, the Civil Rights Act of 1866 (42 U.S.C. § 1981), the labor law duty of fair representation, or any other applicable federal law. *Compare* Hodgson v. UMW, 1972, 153 U.S. App.D.C. 407, 473 F.2d 118, 122 n. 15, 128-30 (suit by Secretary under Title III of LMRDA is *res judicata* as against union members; Rule 24(a)(2) intervention allowed).

Also to be distinguished are cases such as Atlantis Development Corp. v. United States, 5 Cir. 1967, 379 F.2d 818 (title to property); Martin v. Travelers Indem. Co., 5 Cir. 1971, 450 F.2d 542 (liability insurance coverage); and Nuesse v. Camp, 1967, 128 U.S.App.D.C. 172, 385 F.2d 694 (conflict between federal banking laws and state law), in which courts have granted (a)(2) intervention because of the practical disadvantages that would follow from peculiar *stare decisis* effects, if intervention were not allowed. Again contrasting this case, we have difficulty conceiving of how the consent decrees—products of negotiation rather than contested litigation—are likely to carry *stare decisis* effects measurably adverse to NOW or its membership in any future proceeding. A careful analysis of the decrees demonstrates that such an assumption would be not only quite premature, but also naively critical of the perceptive abilities of the judiciary. *See* Judge Motley's lucid discussion in Leisner v. New York Tel. Co., S.D.N.Y.1973, 358 F.Supp. 359, 369-70. *Cf.* Pettway v. American Cast Iron Pipe Co., 5 Cir. 1974, 494 F.2d 211, 221 n. 21; Rodriguez v. East Texas Motor Freight, 5 Cir. 1974, 505 F.2d 40, at p. 65; Dickerson v. United States Steel Corp., E.D.Pa.1974, 64 F.R.D. 351.

In no respect does this case bear genuine resemblance to the kind of bizarre problems encountered in Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 87 S.Ct. 932, 17 L.Ed.2d 814 (1967). *See* Kaplan, *Continuing Work of the Civil Committee:* [etc.] *(I)* 81 Harv.L.Rev. 356, 405-06 (1967).

[13, 14] Insofar as NOW's application may be deemed to have sought permissive intervention under Rule 24(b), no abuse of discretion has been shown in the denial. The district court was clearly justified in determining that the interests of the majority of the affected individuals predominated over NOW's interest in further delaying implementation of the decrees' reforms. Such determinations must be viewed in light of the circumstances as they existed at the time. EEOC v. United Air Lines, *supra*, 515 F.2d at 949. In this case, a full hearing had been held and NOW had received ample opportunity to present its arguments. The court below did not err in denying further intervention. Consequently, NOW's appeal *qua* organization must be dismissed.[22]

## III. THE APPEALS ON THE MERITS: CHALLENGES TO THE CONSENT DECREES

### A. *Scope of Review*

[15] Before proceeding with our examination of the appellants' numerous and provocative challenges to the consent decrees, it is appropriate that we outline the rules of law which govern the parameters of our review. Initially, it cannot be gainsaid that conciliation and voluntary settlement are the preferred means for resolving employment discrimination disputes. As early as 1968, Judge Bell wrote for this court: "It is thus clear that there is great emphasis in Title VII on private settlement and the elimination of unfair practices *without litigation.*" Oatis v. Crown Zellerbach Corp., 5 Cir. 1968, 398 F.2d 496, 498 (emphasis added). Subsequently, in Dent v. St. Louis-San Francisco Ry. Co., 5 Cir. 1969, 406 F.2d 399, 402, Judge Coleman advanced the same thesis:

> Thus it is quite apparent that the basic philosophy of these statutory provisions is that *voluntary compliance is preferable to court action and that efforts should be made to resolve these employment rights by conciliation both before and after court action.*

(emphasis added). In Culpepper v. Reynolds Metals Co., 5 Cir. 1970, 421 F.2d 888, 891, we declared that "the central theme of Title VII is 'private settlement' as an effective end to employment discrimination," citing *Oatis*. Next, in Hutchings v. United States Industries, Inc., 5 Cir. 1970, 428 F.2d 303, 309, Judge Ainsworth stated:

> [I]t is clear that Congress placed great emphasis upon private settlement and the elimination of unfair practices without litigation (citing *Oatis*) on the ground that voluntary compliance is preferable to court action. (citing *Dent*). *Indeed, it is apparent that the primary role of the EEOC is to seek elimination of unlawful employment practices by informal means leading to voluntary compliance.*

(emphasis added).[23]

Our recent excursions into this area have not detoured from the foregoing principles, but have emphasized instead their practical value. In the most sweeping of all our employment discrimination decisions, Pettway v. American Cast Iron Pipe Co., 5 Cir. 1974, 494 F.2d

22. Although we have determined that intervention as of right under F.R.Civ.P. 24(a)(1) was not available to the private parties and groups who sought intervention in this case, some of whose applications were granted below on the assumption that § 706(f)(1) of Title VII conferred such right, we proceed nonetheless to consider the merits of the attacks lodged against the consent decrees by the remaining intervenors-appellants. We do so on the assumption that the district court, having concluded that certain parties ought to be granted intervention either by right or by permission, would have allowed those parties to intervene in any event under either 24(a)(2) or (b). No appellee has suggested by way of cross-assignment or otherwise that we should not go forward to the merits.

23. *Accord*, Guerra v. Manchester Terminal Corp., 5 Cir. 1974, 498 F.2d 650; Airline Stewards and Stewardesses v. American Airline Stewards and Stewardesses v. American Airlines, Inc., 7 Cir. 1972, 455 F.2d 101, 109; Fekete v. United States Steel Corp., 3 Cir. 1970, 424 F.2d 331, 336; Bowe v. Colgate-Palmolive Co., 7 Cir. 1969, 416 F.2d 711; Jenkins v. United Gas Corp., 5 Cir. 1968, 400 F.2d 28.

BLEED THROUGH

211, 258, we said in regard to the firmly established, but nonetheless thorny and speculative matter of awarding classwide back pay:

> Initially, we approve the district court's intention of referring the back pay claims to a Special Master, Fed.R. Civ.P. 53. United States v. Wood, Wire & Metal Lathers Int. Union, Local 46, 328 F.Supp. 429, 441 (S.D.N.Y.1971). *However, the court and the parties may also consider negotiating an agreement. E.g.*, Johnson v. Goodyear Tire & Rubber Co., 349 F.Supp. 3, 18 (S.D.Tex.1972), 491 F.2d 1364 (5th Cir. March 27, 1974); United States v. Wood, Wire & Metal Lathers, Int. Union, Local 46, *supra* 328 F.Supp. at 444 n. 3. *An alternative is to utilize the expertise of the intervening Equal Employment Opportunity Commission to supervise settlement negotiations or to aid in determining the amount of the award.*

(emphasis added).

Nor has the Supreme Court maintained detached silence in regard to the deference courts should accord the processes of voluntary conciliation and settlement. Describing Title VII and the functions of the EEOC, Mr. Justice Powell in Alexander v. Gardner-Denver Co., 415 U.S. 36, 44, 94 S.Ct. 1011, 1017-18, 39 L.Ed.2d 147, 156 (1974), wrote for the Court:

> Cooperation and voluntary compliance were selected as *the preferred means* for achieving [the elimination of unlawful employment discrimination]. To this end, Congress created the Equal Employment Opportunity Commission and established a procedure whereby State and local equal employment opportunity agencies, as well as the Commission, would have *an opportunity to settle disputes through conference, conciliation, and persuasion before the aggrieved party was permitted to file a lawsuit.* In the Equal Employment Opportunity Act of 1972, Pub.L. 92-261, 86 Stat. 103, Congress amended Title VII to provide the Commission with further authority *to investigate individual charges of discrimination, to promote voluntary compliance with the requirements of Title VII, and to institute civil actions against employers or unions named in a discrimination charge.*

(emphasis added). In *Gardner-Denver* the Supreme Court stressed the importance of voluntary settlement in voicing its disapproval of a policy of deferral to binding arbitration. In the Court's view, such a policy could adversely affect the arbitration system as well as the vindication of individual rights, since the employee—fearful of the arbitral forum—might elect to bypass arbitration and file a lawsuit instead. *"The possibility of voluntary compliance or settlement of Title VII claims would thus be reduced, and the result could well be more litigation, not less."* 415 U.S. at 59, 94 S.Ct. at 1025, 39 L.Ed.2d at 164. (emphasis added).

So far, we have emphasized only one side of the coin—the side which places a premium on the achievement of voluntary compliance. In doing so, we have not overlooked that the "final responsibility for enforcement of Title VII is vested with federal courts," *Gardner-Denver, supra*, 415 U.S. at 44, 94 S.Ct. at 1018, 39 L.Ed.2d at 156, and that "Congress gave private individuals a significant role in the enforcement process of Title VII." *Id. See also* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971).[24] Nor have

24. Statements to the same effect may be found in virtually in all of the cases which we have canvassed in stressing the importance of conciliation and settlement, and in legion others as well. *See, e.g.*, Gamble v. Birmingham Southern R. R., 5 Cir. 1975, 514 F.2d 678, at p. 686. To repeat the citations would be superfluous in view of the Supreme Court's repeated and emphatic recognition of the important enforcement role played by private suitors.

we forgotten that "the private right of action remains *an* essential means of obtaining judicial enforcement of Title VII." *Gardner-Denver, supra,* 415 U.S. at 45, 94 S.Ct. at 1018, 39 L.Ed.2d at 156 (emphasis added), and cases cited. We are fully mindful, moreover, that the EEOC's limited resources permit it to undertake serious conciliation or lawsuits in only a small fraction of the cases on its docket.[25] For that reason, the congressional scheme continues to depend in substantial measure upon "private attorneys general" who, through their lawsuits in the federal courts, elicit enunciation of the great bulk of policies and principles which serve to flesh out the basic congressional mandate.

Yet we deal here with one of those rare instances in which the government has, to its satisfaction, successfully negotiated a comprehensive voluntary accord. At least ostensibly, the government has done precisely what it ought to do as a matter of public policy in order to vitiate the need for additional industry-wide litigation. On the other hand, the product of the considerable efforts on behalf of the government, the steel companies, and the union does not purport to foreclose any alternatives that may otherwise exist for individuals who had rather litigate than participate in the entire settlement.[26] We

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25. According to one fairly recent source, the EEOC—to no one's surprise—"suffers from a considerable work backlog." It is reported that as of June 30, 1971, some 32,000 cases were backlogged, and that the processing of a charge may consume eighteen to twenty-four months. Further, after the EEOC finds reasonable cause, another six months usually passes before it seeks conciliation.

In fiscal 1972, the last year prior to implementation of the 1972 amendments which gave the EEOC power to sue, the Commission found reasonable cause to assert unlawful discrimination against only 1,390 employers. Settlement was attempted to some degree with 792 of these employers, but only 268 attempts resulted in a partial or complete success. Note, *The Tentative Settlement Class and Class Action Suits Under Title VII of the Civil Rights Act*, 72 Mich.L.Rev. 1462, 1463 n. 11, 1464 n. 17 (1974).

Another source reports that as of the close of fiscal 1974, the EEOC's backlog had grown to nearly 98,000 charges. 181 BNA—DLR—D-1, 5 (Sept. 17, 1974).

26. In this respect, the consent decrees present a situation somewhat analogous to that recently examined by the Supreme Court in Johnson v. Railway Express Agency, Inc., ..... U.S. ....., 95 S.Ct. 1716, L.Ed.2d 295 (1975). In *Johnson* it was argued that the timely filing of an employment discrimination charge with the EEOC, pursuant to Title VII, should be held to toll the applicable state statute of limitations for a suit under 42 U.S.C. § 1981 on the same cause of action. Rejecting the argument, the Supreme Court reiterated the theme of *Gardner-Denver* that the various legal remedies for employment discrimination are cumulative and complementary. From the grievant's standpoint, "[u]nder some circumstances, the administrative route may be highly preferred over the litigatory; under others the reverse may be true." ..... U.S. at ....., 95 S.Ct. at 1720, 44 L.Ed.2d at .....

The most significant feature about *Johnson* is its emphasis on the principle that the choice over which way to proceed belongs to the grievant:

> Petitioner argues that a failure to toll the limitation period in this case will conflict seriously with the broad remedial and humane purposes of Title VII. Specifically, he urges that Title VII embodies a strong federal policy in support of conciliation and voluntary compliance as a means of achieving the statutory mandate of equal employment opportunity. He suggests that failure to toll the statute on a § 1981 claim during the pendency of an administrative complaint in the EEOC would force a plaintiff into premature and expensive litigation that would destroy all chances for administrative conciliation and voluntary compliance.
>
> We have noted this possibility and, indeed, it is conceivable, and perhaps almost to be expected, that failure to toll will have the effect of pressing a civil rights complainant who values his § 1981 claim into court before the EEOC has completed its administrative proceeding. (footnote omitted). * * But the fundamental answer to petitioner's argument lies in the fact—presumably a happy one for the civil rights claimant—that Congress clearly has retained § 1981 as a remedy against employment discrimination separate from and independent of the more elaborate and time consuming procedures of Title VII.

BLEED THROUGH

say *entire* because the injunctive relief provided by the consent decrees extends to all affected steelworkers, regardless whether they elect to accept the back pay and execute the releases. The question at this point, then, is through what lens do we judge the adequacy of the settlement as against the intervenors' objections, bearing in mind that Congress and the Supreme Court have expressed a preference for voluntary compliance above all other tools of enforcement?

We think the answer was delivered nearly fifteen years ago by Judge (now Chief Judge) Brown in Florida Trailer and Equipment Co. v. Deal, 5 Cir. 1960, 284 F.2d 567, in which an objecting creditor sought to void a referee and district court-approved settlement, reached pursuant to the Bankruptcy Act, between the trustee of the insolvent estate and a lien creditor. There we stated:

> Of course, the approval of a proposed settlement does not depend on establishing as a matter of legal certainty that the subject claim or counterclaim is or is not worthless or valuable. The probable outcome in the event of litigation, the relative advantages and disadvantages are, of course, relevant factors for evaluation. But the very uncertainty of outcome in litigation, as well as the avoidance of wasteful litigation and expense, lay behind the Congressional infusion of a power to compromise. This is a recognition of the policy of the law generally to encourage settlements. This could hardly be achieved if the test on hearing for approval meant establishing success or failure to a certainty. Parties would be hesitant to explore the likelihood of settlement apprehensive as they would be that the application for approval would necessarily result in a judicial determination that there was no escape from liability or no hope of recovery and hence no basis for a compromise.

284 F.2d at 571. Judge Brown continued:

> Obviously, it would not be a settlement if to obtain approval the Trustee would have to demonstrate that he could not succeed had the preference claim been pressed. *All that he must do is establish to the reasonable satisfaction of the Referee that, all things considered,* (citation omitted), *it is prudent to eliminate the risks of litigation to achieve specific certainty though admittedly it might be considerably less (or more) than were the case fought to the bitter end.* * * *

*Id.* at 573 (emphasis added).

Despite the appearance of an occasional contextual gloss,[27] the approach to judicial evaluation of proposed settlements announced in *Deal* has drawn firm adherents among the federal courts. *See* City of Detroit v. Grinnell Corp., 2 Cir. 1974, 495, F.2d 448, 455-56 (objectors must show clear abuse of discretion in trial court's approval of settlement); Bryan v. Pittsburgh Plate Glass Co., 3 Cir. 1974, 494 F.2d 799, 803, *cert. denied,* Abate v. Pittsburgh Plate Glass Company, 419 U.S. 900, 95 S.Ct. 184, 42 L.Ed.2d

..... U.S. at ....., 95 S.Ct. at 1722, 44 L.Ed.2d at ..... Likewise in this case, individual employees will find themselves faced with the choice whether to timely accept back pay under the consent decrees, for which no litigation will be necessary, or file private charges and/or lawsuits and risk the usual litigatory uncertainties in quests for greater recoveries. We know of no policy or rule of law, however, which forbids the erection of such a choice when its effect is to leave the individual grievant in a position no worse, but in fact better, than that occupied in the absence of the settlement, which, of course, is not binding on the individual unless he or she so desires.

27. *E.g.*, West Virginia v. Chas. Pfizer & Co., S.D.N.Y.1970, 314 F.Supp. 710, 740 *aff'd*, 2 Cir. 1971, 440 F.2d 1079, *cert. denied, sub nom.*, Cotler Drugs, Inc. v. Chas. Pfizer & Co., 404 U.S. 871, 92 S.Ct. 81, 30 L.Ed.2d 115 (1971) ("fair, reasonable and adequate"); McCray v. Beatty, D.N.J.1974, 64 F.R.D. 107, 110 (court "would not approve a settlement that appeared inequitable or unfair to any party to the suit").

146 (1974) (settlement not unfair simply because many class members oppose it); Greenspun v. Bogan, 1 Cir. 1974, 492 F.2d 375, 381 (only where one side is so clearly correct that offer in compromise becomes clearly unreasonable does trial court abuse discretion in approving settlement); Ace Heating & Plumbing Co., Inc. v. Crane Co., 3 Cir. 1971, 453 F.2d 30, 34 (great weight is accorded the trial judge's views); West Virginia v. Chas. Pfizer & Co., 2 Cir. 1971, 440 F.2d 1079, 1085-86, *cert. denied*, see footnote 27, *supra*, (appellate court will disturb settlement approval only upon clear showing of abuse of discretion). *See also* Young v. Katz, 5 Cir. 1971, 447 F.2d 431.

Applying the *Deal* approach to the issues before us, we align ourselves with certain propositions which were recently developed by the Second Circuit in its review of a similar, though less expansive, Title VII settlement, *see* Patterson v. Newspaper and Mail Deliverers' Union of New York and Vicinity, 2 Cir. 1975, 514 F.2d 767. In the first place, the scope of our review is narrow and we should interfere with the implementation of the consent decrees only upon a clear showing that the district judge abused his discretion by approving the settlement. Next, to the extent that the settlement may in occasional respects arguably fall short of immediately achieving for each affected discriminatee his or her "rightful place," we must balance the affirmative action objectives of Title VII and Executive Order 11246 against the equally strong congressional policy favoring voluntary compliance. The appropriateness of such balancing is especially clear, as here, "in an area where voluntary compliance by the parties over an extended period will contribute significantly toward ultimate achievement of statutory goals." 514 F.2d at 771. Nor should we substitute our notions of fairness and adequacy of the relief for those of the parties and Judge Pointer, absent a strong showing that the district court failed to satisfy itself of the settlement's overall fairness to beneficiaries and consistency with the public interest. Finally, and of utmost importance, we are without authority to modify or rewrite the parties' agreement. Our only alternative, if it were shown that Judge Pointer abused his discretion or overlooked an illegal provision, would be to vacate his approval of the entire settlement, and remand for trial of the government's "pattern or practice" compliant. *See* United States v. Atlantic Ref. Co., 360 U.S. 19, 23, 79 S.Ct. 944, 946, 3 L.Ed.2d 1054, 1057 (1959); *Patterson, supra*, 514 F.2d at 772. *Cf.* United States v. Blue Chip Stamp Co., C.D.Cal. 1967, 272 F.Supp. 432, 440, *aff'd per curiam sub nom.*, Thrifty Shoppers Scrip Co. v. United States, 389 U.S. 580, 88 S.Ct. 693, 19 L.Ed.2d 781 (1968).

To the foregoing observations we add a few remarks which we think are particularly pertinent to these appeals. The central issue here is not whether the consent decrees achieve some hypothetical standard constructed by imagining every benefit that might someday be obtained in contested litigation. The question which we must decide is whether the responsible government agencies may lawfully conciliate and settle by consent decree charges of discrimination cutting across an entire industry in a manner which assures cooperative defendants that they will not face future government lawsuits on those claims, and which accords the defendants the opportunity to offer final satisfaction to aggrieved individuals who are willing to accept tenders of back pay and execute the releases. Throughout their arguments, the appellants imply that private suits by thousands of unspecified employees whose grievances are generally covered by the decrees would be virtually certain to achieve far better results than those obtained by the government. Yet this implication, stripped of its rhetoric, goes really only to back pay insofar as the Harris appellants are concerned. Those appellants have challenged seriously the adequacy of the decrees' injunctive measures neither in the district

BLEED THROUGH

court nor in this court.[28] Only the three female appellants have done so, and their contentions—though they certainly suggest possibilities—do not approach any stretch of certainty. Against the overwhelming speculative advantage that might accrue to a small number of aggrieved persons if the decrees were vacated must be weighed the certain loss to all of the immediate injunctive benefits and the unimpeded opportunity to receive some back pay today—instead of after months or years of litigation. Additional losses which must be considered include the nation's investment in the resources consumed by the federal agencies in negotiating these decrees, as well as the chance justly to finalize a matter that otherwise would burden agencies and courts and continue to disrupt an industry vital to the nation's security for years to come. We proceed now to examine specific issues raised by the appellants.

* * *

E. *Lack of Prior Notice*

The final contention raised by all appellants is that the decrees should be invalidated on the ground that interested private parties and their counsel were not invited to participate in pre-decree negotiations, nor were they given advance formal notice and opportunity to intervene prior to entry of the decrees by the district court. To eliminate much confusion at the outset, we repeat that we are concerned with a consent judgment between agencies of the federal government, nine steel companies, and a union. This judgment, in the form of an industry-wide settlement of disputes relating to employment discrimination, was reached after months of conciliations among the parties and the filing of an undisputedly proper § 707 "pattern or practice" complaint by the government. To the extent appellants believe that the absence of prior notice and opportunity to intervene abridged an unconditional right of intervention, that belief should be dispelled by part II of our opinion, *supra*.

Moreover, we know nothing in §

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28. The extremely dubious validity of the appellants' implication is highlighted by certain examples. Although Title VII had been in effect almost nine years at the time of the consent decrees' entry, private actions had been instituted at no more than a dozen of the 250 plants covered by the decrees. Of these private actions, only one had proceeded to final judgment, the Fairfield Works case, *see* note 7, *supra*. In that case sweeping injunctive reforms were ordered and implemented, but the district court denied back pay to the overwhelming majority of aggrieved steelworkers. Whereas the consent settlement extends offers of back pay to all production and maintenance minority employees hired before 1968 and all female employees hired before the date of the decrees, the back pay awarded in the Fairfield case was limited to sixty-one blacks hired before 1963.

Furthermore, the Fairfield order provided affirmative relief only to blacks. The consent decrees provide such relief to females and Spanish-surnamed Americans as well. Consent Decree II, for example, establishes as an interim affirmative goal that twenty percent of all new hires in production and maintenance departments shall be females.

Also, the order in Fairfield provided for rate retention only to blacks who transferred within three years of the date of the order. Consent Decree I creates a rate retention remedy which applies to all female and minority employees with plant seniority as of January 1, 1968, and who may wish to transfer at any time in the future. The rate retention in Fairfield lasted for only one year following transfer; the retention period under Consent Decree I continues for up to two years.

Finally, the time factor alone is illuminating as it surfaces in these cases. It took six months to try the Fairfield suit. The relief eventually ordered there is no more impressive than the reforms which were hammered out by the government, the steel companies, and the union during six months of negotiations. If we consider back pay, then the Fairfield relief per capita is far less than under the decrees. The appellants here do not dispute the steel companies' estimate that if an equivalent amount of time were used to litigate the issues at each of the 250 plants covered by the decrees, it would take at that rate ten years to try just the *liability* issues. If after trial the back pay issues were referred to a special master for individualized computations, including lack of qualification, voluntary freezing, refusal to bid, and physical fitness, and if one hour were allotted each of 60,000 claimants, over twenty-eight years of trial time could be consumed. Brief for appellee steel companies at 11 n. 14.

707 or in any other statute, order or regulation which suggests that the parties *must* permit private individuals to participate in their conferences before the government may finalize a "pattern or practice" consent decree. *Cf.* Hadnott v. Laird, 1972, 149 U.S.App.D.C. 358, 463 F.2d 304, 308. For reasons explained heretofore, private parties do not rise and fall on the outcome obtained by the government. "In short, the Government's right and duty to seek an injunction to protect the public interest exist without regard to any private suit or decree." United States v. Borden Co., 347 U.S. 514, 519, 74 S.Ct. 703, 706, 98 L.Ed. 903 (1954). As a matter of policy, we think it highly doubtful that participation in "pattern or practice" conciliations by everyone who so desired would serve either the public interest or the interests of minority and female employees.[77] The remarkable feature of the present decrees is that so many self-interested parties were able to leave so few unresolved remedial issues. The major concessions yielded by the defendants could have been obtained only by all parties to the negotiations working together unselfishly toward a settlement keyed to broader public goals. If a multitude of intervenors and representatives of private individuals with conflicting personal interests had participated in the framing of the decrees, then probably no comparable industry-wide agreement could have been reached.

The Appellants' demand for notice and hearing prior to judicial approval of the consent decrees is not well taken. Assuming *arguendo* that the 1972 amendments to Title VII did not affect the capacity of private persons to maintain a "pattern or practice"-type cause of action,[78] we do not think that appellants were indispensable parties.[79] No

77. Citing a policy of the Department of Justice under which proposed antitrust consent decrees are made public for "comment or criticism" thirty days prior to entry, appellants ask us to order the EEOC and Department of Labor to adopt a similar policy for Title VII—Executive Order 11246 consent decrees. Appellants assert that we have the necessary authority by virtue of our general supervisory appellate jurisdiction. Perhaps appellants are correct, but we decline at this time to so order the agencies. The issue is not fully briefed, and our reluctance is based on an exercise of discretion. The appellants' idea, however, may deserve serious consideration by the appropriate departments of government.

78. At least one court has rejected the contention that the amendments narrowed the permissible scope of private Title VII actions instituted subsequent thereto. *See* Dickerson v. United States Steel Corp., *supra*, 64 F.R.D. at 359-60 (by vesting EEOC with power to sue, Congress intended to supplement, rather than supplant, existing remedies.)

79. F.R.Civ.P. 19:

*Rule 19.*
*Joinder of Persons Needed for Just Adjudication*

(a) *Persons to be Joined if Feasible.* A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the value of the action improper. he shall be dismissed from the action.

(b) *Determination by Court Whenever Joinder not Feasible.* If a person as described in subdivision (a) (1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice

BLEED THROUGH

bona fide contention is made that appellants' joinder was essential to fashioning a complete, final, and enforceable judgment as between the government and the defendants. *See* Advisory Committee Note, 1966 Amendments to F.R. Civ.P. 19. Furthermore, as we have reiterated throughout, every appellant and every employee whom appellants purport to represent retains his or her private right of action in its entirety.[80] Obviously, the nonjoinder of appellants and all other minority and female steelworkers subjects each defendant to "a substantial risk of incurring double, multiple, or otherwise inconsistent obligations." Quite arguably, however, that is a risk Congress intended to impose. Without a doubt it is one which the defendants are willing to incur. In any case, the appellants have neither identified all of the persons whom they would have the court join as plaintiffs, nor did they present any evidence concerning the physical feasibility of such joinder. We conclude that the district court did not abuse any principles of "equity and good conscience" in proceeding as it did, especially in view of the drastic and disfavored remedy of dismissal which is dictated by Rule 19 where indispensability is inescapable. *Cf.* United States v. Masonry Contractors Assn., *supra*, 497 F.2d at 875. Note also that the district court took special care in the "shaping of relief," F.R.Civ.P. 19(b), to avoid prejudice with respect to future intervention, even by persons who already had been allowed to intervene, in the event additional questions arise concerning the decrees in operation. 63 F.R.D. at 4 n. 2, 5. This procedure may well prove to be more useful over the life of the decrees than would a single opportunity for a contest preceded by formal notice to all interested individuals, assuming such notice were physically and fiscally possible.

Actually, any further consideration of appellants' theory in terms of joinder of parties becomes hopelessly distorted and unproductive. It appears to us—though again the argument is utterly vague and conclusory[81]—that their real objective is to convert what began as a government "pattern or practice" suit into an eventual F.R.Civ.P. 23 class action. Under Rule 23(a) one or more members of a class may initiate a class action when, *inter alia*, "(1) the class is *so numerous that joinder of all members is impracticable* . . . ." (emphasis added). This criterion is consistent with the scope in which appellants purport to prosecute these appeals: "Appellants intervened for the express purpose of assuring that all aggrieved employees, to the extent practicable, were given adequate notice and an opportunity to be heard prior to final

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can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) *Pleading Reasons for Nonjoinder.* A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) *Exception of Class Actions.* This rule is subject to the provisions of Rule 23.

80. This follows from the rule that the judgment in a government "pattern or practice" action simply does not bind private individuals, unless they voluntarily choose to become parties to it. *See* note 38, *supra*.

Hence, we also fail to see how the consent decrees "raise difficult questions under . . . the Due Process Clause." Brief for Appellants Harris, et al., at 87. Specifically, we cannot conceive of how the decrees operate as an "adjudication" of appellants' rights, or how their terms may deprive the appellants of life, liberty, or property—particularly when, as we have determined, no private person has a "right" to advancement of his or her specific claim in litigation brought by the government in court in a capacity comparable to attorney and client. *See* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313, 70 S.Ct. 652, 656-57, 94 L.Ed. 865, 872 (1950). *See also* our discussion of paragraphs C and 19, *supra*.

81. Brief for Appellants Harris, et al., at 87.

approval of the Decrees;"[82] and: "National Organization for Women, Inc., Present and Former Female Employees of Defendant Companies."[83]

[49] We need not delve into a labyrinthian search for the answer to whether the district court somehow erred in failing to certify the proceedings below as a class action before finally entering the decrees, for no one has briefed or argued the point in exactly those terms. Yet we find both ironic[84] and puzzling the apparent assumption that class action treatment necessarily would have yielded the results sought by appellants. In the context of Title VII and employment discrimination generally, such actions today are conducted typically pursuant to F.R.Civ.P. 23(b)(2), which presupposes allegations that the defendant has acted or refused to act in a manner hostile to the group, thus making declaratory or injunctive relief appropriate in favor of the entire class, if warranted by the evidence.[85] The (b)(2) class is by definition a cohesive aggregate, and hence its members are said to be bound by a "superior" *res judicata* effect. *See* Wetzel v. Liberty Mutual Ins. Co., 3 Cir. 1975, 508 F.2d 239, cert. denied ..... U.S. ....., 95 S.Ct. 2415, 44 L.Ed.2d 679 (1975); LaChapelle v. Owens-Illinois, Inc., 5 Cir. 1975, 513 F.2d 286, 288 n. 7 ((b)(2) members may not "opt out"); 3B. J. Moore's Federal Practice ¶23.31[1], at 23-526-27 (1974). Thus, unlike the 23-(b)(3) "common question" class action (most frequently utilized in suits for money damages), as to which Rule 23-(c)(2) requires individual notice to the fullest practicable extent, Rule 23 contains no specific notice requirement for (b)(2) actions.[86]

Even so, in connection with awards of classwide back pay we have suggested that *some* form of notice should be distributed in order to overcome "the problem of binding unidentified class members." *Pettway, supra,* 494 F.2d at 257. But experience teaches that such notice may come late in the litigation. *Id.* Moreover, in view of Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 n. 14, 94 S.Ct. 2140, 2152 n. 14, 40 L.Ed.2d 732, 748 n. 14 (1974), and Sosna v. Iowa, 419 U.E. 393, 396 n. 4, 95 S.Ct. 553, 556 n. 4,

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82. Reply Brief for Appellants Harris, et al., at 23. *See also* footnote 10, *supra.* The Harris intervenors' complaint in intervention before the district court was to the same effect. Specific reliance was placed on Rule 23. Appendix at 130a.

83. Certificate Required by Fifth Circuit Local Rule 13(a), Brief for Appellants NOW, et al. Because these (13(a) certificates are sometimes worded broadly in the interest of caution for which the court is appreciative—we add the following extract from NOW's amended complaint in intervention, filed in behalf of the three female appellants, which leaves no room for doubt:

> 3. Plaintiffs Beasley, Fix and Halascsak bring this action pursuant to Rule 23(b)-(2) and (3), F.R.C.P., on behalf of all former, present and future female employees of Defendant Companies. * * * The class is also composed of female persons who were, or might become members of the Defendant United Steelworkers of America, AFL-CIO, and who have been and continue to be or might be adversely affected by the practices complained of herein.

Appendix at 168a.

84. As did Judge Pointer. *See* 63 F.R.D. at 7.

85. *See, e.g.,* Franks, *supra,* 495 F.2d at 421-22; *Pettway, supra,* 494 F.2d at 256-57; Johnson v. Goodyear Tire & Rubber Co., *supra,* 491 F.2d at 1375; Bing v. Roadway Express, Inc., *supra,* 485 F.2d at 447-48; Robinson v. Lorillard Corp., 4 Cir. 1971, 444 F.2d 791, 801-02, *cert. dismissed,* 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655; Bowe v. Colgate-Palmolive Co., *supra,* 416 F.2d 711, 720. The usual arguments for (b)(2) treatment proceed from the theorem that "racial discrimination is by definition class discrimination." *E.g.,* Dickerson v. United States Steel Corp., *supra,* 64 F.R.D. at 357-59.

86. The notice contemplated by Rule 23-(d)(2), for example, is not mandatory, but rather discretionary with the trial court. *Bing, supra,* 485 F.2d at 448. "The rule . . . does not command the giving of any notice to members of (b)(1) and (b)(2) types of class actions, and "in the degree that there is cohesiveness or unity in the class and the representation is effective, the need for notice to the class, will tend toward a minimum.'" 3B. J. Moore's Federal Practice ¶23.72, at 23-1421 (1974), *quoting* Advisory Committee Note, 1966 Amendments to F.R.-Civ.P. 23.

BLEED THROUGH

42 L.Ed.2d 532, 539 n. 4 (1975), we must approach skeptically the notion that such notice must issue at all—at least at the expense of someone other than a volunteer—in class actions other than (b)(3) actions. In *Eisen* the Supreme Court carefully laid aside the dual problem of what notice, if any, might someday be necessary in favor of a (b)(1) or (b)(2) class's absent members, and who would be responsible for the expense. In *Sosna*, however, the Court indicated quite plainly that since the suit sought injunctive and declaratory relief, but not monetary relief, "the problems associated with a Rule 23(b)(3) class action, which were considered by this Court last Term in [*Eisen*]," did not exist. *Id.* Thus, speaking conservatively, it is by no means clear that advance notice to all affected individuals would have followed had the district court permitted appellants to litigate the merits of the consent decrees in a procedurally less-onerous form of Rule 23 class action. Of course, after *Eisen*, we do not suppose that appellants would have wished to proceed pursuant to Rule 23(b)(3), although we intimate no opinion concerning the nature of relief, if any, which may require a (b)(1) or (b)(2) action to accommodate the notice prescription applicable to class actions under (b)(3). We simply note, by way of summary, that appellants apparently seek to reach a particular destination—advance notice to all aggrieved steelworkers—by a rather dubious and, perhaps, prohibitively expensive route.

Nevertheless, some proviate parties *were* allowed to intervene and attack the decrees' legality subsequent to their entry. Certainly that factor alone did not moot the complaints about the absence of *prior* notice, but we have determined that those complaints lack merit. With respect to the party scope of the subsequent intervention, only NOW complains, and we have already rejected NOW's contentions. The dispute over participation by aggrieved employees thus reduces to the settled principle "that intervention will not be allowed for the purpose of impeaching a decree already made." United States v. California Coop. Canneries, 279 U.S. 553, 556, 49 S.Ct. 423, 424, 73 L.Ed. 838, 841 (1929). Naturally the rule is not inflexible, and we think the district court acted wisely in allowing the intervention that took place. *See* Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 Harv.L.Rev. 721 (1968). Yet the court clearly was entitled to limit the issues as it did, and to deny vacation of the decrees absent a convincing showing that they operated to violate substantial rights of the intervenors. *See generally* 3B. J. Moore's Federal Practice ¶¶24.16[1], 24.16[5], at 24-595-96, 24-651-52 (1974). They do not, and that decides this point.

## IV. RELIEF FOR WOMEN

On behalf of the three female appellants whom it was permitted to appoint as intervenors, NOW complains of certain alleged deficiencies in the items of relief afforded women under the consent decrees. These objections go squarely to the adequacy-in-fact of the decrees' remedial provisions, and therefore our limited scope of review precludes substitution of our judgment for that of the parties. We find none of these alleged shortcomings fatal to the decrees' legality, nor did their possible existence render Judge Pointer's approval of the decrees an abuse of discretion. We briefly discuss these objections.

First, NOW claims that the nation's female workforce is severely underrepresented in the steel industry. Conceding at least "tokenism" by the steel companies in the hiring of women since Title VII took effect on July 2, 1965, NOW nevertheless contends that gross underrepresentation persists—mainly in production and maintenance jobs and in trades and crafts—because many more women would be engaged in such occupations today but for alleged wholesale discharges and bans on new female hires in the post-war 1940's. NOW thus asserts that today's shortage of females in traditionally "male" jobs is a "present

effect" of 1940's sex discrimination; that each of its victims should be identified and immediately hired or reinstated with full constructive seniority and back pay from two years prior to the filing of the first such charge; and that the consent decrees are defective as a matter of law because they do not provide this relief.

We may assume that NOW is correct on all the facts and most of the law, but the consent decrees stand. Assuming, for example, that massive discrimination in the 1940's survived the effective date of Title VII, that constructive seniority could properly be awarded, and that its recipients could show themselves entitled to some amount of back pay, the hurdles of limitations and laches are by now virtually insurmountable, as NOW admitted in the district court. Under these circumstances the decrees clearly are not fatally deficient for want of relief to women who were discharged or refused employment thirty years ago. In the event any woman feels she can sustain such a claim, the decrees plainly do not affect her ability to pursue it in a private suit.

Next, NOW attacks paragraph 10(a) of Consent Decree I, which provides that affirmative goals for female promotion into trades and crafts shall be based on the percentage of females in production and maintenance jobs. Proceeding once more from the alleged historic exclusion of women from both types of jobs, NOW maintains that paragraph 10(a) "makes a mockery" out of any obligation on the companies' part to promote females into trades and crafts.

NOW has simply overlooked paragraph 2(a)(1) of the Agreement incorporated into Consent Decree II. That paragraph establishes as an interim goal, subject to annual review, that twenty percent of all new hires in production and maintenance shall be female. That goal, together with mandatory utilization analyses, is likewise to be submitted to the OFCC for approval pursuant to Executive Order 11246.[87] Trade and craft jobs are among the more desirable and difficult in the plant. It is no surprise that the parties would create priorities in filling those jobs for persons already employed in the plant and thus familiar with its operations. Because the present number of women occupying production and maintenance jobs is small, NOW is correct in that the initial effect of the decrees is to set a relatively small numerical goal for females in trades and crafts. That condition, however, should be cured rather quickly as more women are hired into production and maintenance units and goals are periodically recomputed on the basis of plant population. As the percentage representation of women in production and maintenance grows by virtue of Decree II's hiring requirement, the numerical rate for female advancement to trades and crafts should rise correspondingly. And again, any woman who dislikes the goals established by the decrees retains her right to seek additional or inconsistent relief in court without forfeiting whatever benefits the decrees confer upon her.

NOW's final exclusively-feminist contention is a challenge to the decrees' failure to provide seniority carryover and rate retention for women who may seek to transfer from a technical, clerical, or plant security job into production and maintenance. NOW asserts that such relief is mandated by Bing v. Roadway Express, Inc., *supra*, where we held that a black "city" driver who had been discriminatorily excluded from a higher-paying "road" position was entitled to "road" seniority from the date at which he would have transferred, based on his qualifications, but for racial discrimination. We believe NOW places far too general a reliance on *BING*. Truck driving is essentially truck driving, though firms sometimes require more experience

87. We note that NOW apparently has also overlooked the fifty percent minority-female trade and craft ratio set forth in paragraph 10(d) of Consent Decree I, as well as the twenty-five percent minority-female supervisory goal and affirmative action duties undertaken by the companies in subparagraphs 2(a)(3) and (c), respectively, of Decree II's Agreement.

BLEED THROUGH

for "road" positions. By contrast, secretarial work and rail straightening are, at least in obvious respects, quite different. At any rate, the female appellants did not introduce any evidence into the record which might enable a court to develop this point in greater detail. Accordingly, we assume from our common experience that clerical-technical-plant security and production-maintenance are basically unrelated occupations. Of course, even if we are incorrect, and we know there *are* some similar jobs—*e.g.*, production record-keeping, the present state of affairs is not irrevocable; the progress under each decree is subject to continuing review and modification as circumstances justify. Likewise, any woman who considers herself aggrieved may file a charge and/or a lawsuit. The decrees themselves are not made unlawful simply because they presently fail to deal with every conceivable allegation of discrimination in the steel industry. In conclusion, NOW's claims on behalf of the three female appellants are without merit; NOW's misunderstanding of eligibility for back pay is easily resolved by a careful reading of paragraph 18(c) of Decree I; all other contentions are considered and rejected.

## V. CONCLUSION

We would be remiss if we failed to mention the decision of the Supreme Court in Albemarle Paper Co. v. Moody, — U.S. —, 95 S. Ct. 2362, 44 L.Ed.2d —, which was handed down on June 25, 1975, as we neared completion of our work in this case. We have reviewed *Moody* carefully—indeed with great particularity its repeated emphasis that one of Title VII's paramount purposes is "to make persons whole for injuries suffered on account of unlawful employment discrimination." At p. —, 95 S.Ct. at p. 2372. This emphasis is entirely consistent with the opinions from our circuit which we have cited or discussed herein. Furthermore, we are fully mindful that *Moody* reaffirms as " '[t]he general rule . . . that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury.' " *Id.* at —, 95 S.Ct. at p. 2372, *quoting* Wicker v. Hoppock, 73 U.S. 94, at 99, 6 Wall. 94, at 99, 18 L.Ed. 752.

Yet *Moody* does not affect our thinking about this case. The critical portion of the Court's rejection of "good faith" as a general defense to liability for back pay—a rejection already accomplished in a number of our decisions—begins on page 14 of the opinion, viz: "It follows that, given a *finding* of unlawful discrimination. . . ." (emphasis added). We may reasonably assume that the Court chose its words cautiously, for shortly thereafter it discussed in some detail the meaning of "clearly erroneous" in the context of other issues presented by *Moody*. Here, of course, we have no judicial *finding* of unlawful employment discrimination, only two consent decrees. To our knowledge they are governed by rules of law substantially less rigorous than those which govern contested litigation. Correspondingly, the scope of our appellate review is narrower, though no less deliberate. In sum, we adhere to our conclusions that these consent decrees are consistent with the public interest, that they represent a sound and reasonable exercise of the discretion possessed by the executive agencies, and that they implement the policies of Title VII and related laws to an exceptionally thorough degree. Unless settlement is to be held unlawful, we do not think the decrees may be struck down.

For the reasons assigned heretofore, the judgment of the district court is

Affirmed.

**U.S. v. ALLEGHENY-LUDLUM INDUSTRIES**

**U.S. District Court**
**Northern District of Alabama**

UNITED STATES, etc. v. ALLEGHENY-LUDLUM INDUSTRIES, INC., et al., No. 74-P-339-S, June 7, 1974.

Proceeding in which individuals and groups seek to intervene in action under Title VII of Civil Rights Act of 1964 by U.S. Government agencies against steel companies and union, for purpose of challenging validity of two consent decrees. Individuals permitted to intervene, and decrees upheld.

Martin I. Slate, EEOC, Washington, D.C. (Robert T. Moore and Elaine Afable, U.S. Department of Justice, with him on brief), for plaintiff.

Michael H. Gottesman, Washington, D.C., for defendant union.

William E. Murray and James Forman, Jr., Birmingham, Ala., for defendant employers.

Jack Greenberg, New York, N.Y., Oscar W. Adams, Jr., Birmingham, Ala., Gerald Smith, Baltimore, Md., Bernard Marcus, Pittsburgh, Pa., and Gabrielle K. McDonald, Houston, Tex., for Harris intervenors.

Judith A. Lonquist, Chicago, Ill., for National Organization for Women.

William D. Wells, New York, N.Y., for Everett intervenors.

Eugene S. Bayer and Roy Kaufman, Cleveland, Ohio, for Edwards intervenors.

POINTER, District Judge: — After months of negotiations pursuant to the governmental conciliation function of Title VII, 42 U.S.C.A. § 2000e et seq., the parties herein reached a tentative agreement as to a manner and means for correcting allegedly discriminatory employment practices of a systemic nature at some 450 steel plants and other steel-related facilities throughout the nation. The agreement was reduced in writing in the form of two consent decrees entered into by the United States, through various governmental agencies including the Justice Department, the Labor Department and the Equal Employment Opportunity Commission, as plaintiff, and by nine steel companies and the United Steelworkers of America, as defendants. The proposed decrees were presented to, and entered by, this court on April 12, 1974, resulting in a broad national settlement of Title VII, and related, disputes between the United States and the ten defendants. The provisions reflect a thoughtful and earnest attempt to respond to—and to reconcile competition between—charges of employment discrimination made on behalf of black, female, and Spanish surnamed workers and applicants.

Consent Decree I takes the form of an injunction with respect to those matters which, in general, have previously been affected by collective bargaining between the companies and the union. The decree provides for a restructuring of seniority rules and regulations, primarily using plant continuous service as a base; specifies procedures respecting transfers, promotions, vacancies, layoffs and recalls, and enumerates affirmative action guidelines and goals with respect to trade and craft positions and initial selection and assignment of employees. In recognition that general standards may require tailoring to meet local problems and that experience may indicate the inadequacy of some of the remedial steps, implementation procedures and enforcement tools are established through a structure of Implementation Committees, composed of company, union and majority members, at each affected facility, as well as an Audit and Review Committee which is national in scope. A mechanism for expeditious and coordinated resolution of the multitude of pending EEOC charges respecting these defendants is established. A potential back-pay fund of $30,940,000.00 is created, along with guidelines for calculating and disbursing awards to electing individual employees affected by past discrimination. Jurisdiction is retained by the court for a period of at least five years.

BLEED THROUGH

Consent Decree II takes the form of a general injunction respecting those aspects of employment which are, essentially, company-controlled and not normally subject to collective bargaining agreements. The companies are generally enjoined from any form of employment discrimination and are obligated to institute a program of affirmative action with respect to hiring, initial assignments, and management training programs, as well as affirmative recruitment of minorities. See Morrow v. Crisler, 491 F.2d 1053 (CA5 1974); Franks v. Bowman Transportation Co., ..... F.2d ....., (CA5 #72-3239; June 3, 1974). The court retains jurisdiction for at least five years; and, as also is true regarding Consent Decree I, the consent decree between the government and the defendants does not purport to bind any individual employee or to present the institution or maintenance of private litigation.

Shortly after entry of these decrees, various individuals and organizations sought to intervene. A hearing was set for May 20, 1974, with the request that briefs be filed by May 13th and reply briefs by the hearing date. This memorandum is addresed to the claims for intervention and certain other issues raised thereby and is issued after a study of the motions, briefs, reply briefs, and oral argument presented at the May 20th hearing.

**Intervention**

The court concludes that §§ 707(e) and 706 of Title VII, 42 U.S.C.A. § 2000e-7(e) and 2000e-5, confer upon some petitioners a right to intervene within the meaning of Rule 24(a)(1), F.R.C.P. This statutory right is provided to a "person or persons aggrieved" within the meaning of Title VII. In this context, the term refers to those individuals with respect to whom alleged discrimination by the defendants is within the scope of a charge which has heretofore been presented to the EEOC, without regard to whether such charge was filed by them, by fellow employees with similar complaints, by an organization on their behalf, or by a member of the EEOC, and without regard to whether or not they are named plaintiffs or actual or putative class members in pending litigation.

Most of the individual petitioners—including some who joined in the petitions of the Ad Hoc Committee and of the National Organization of Women[1]—meet the test for intervention of right under Rule 24(a)(1) as just stated. The court concludes that the balance of the individual petitioners — including one who is the principal officer of the Rank and File Committee, the other organizational petitioner—should also be allowed to intervene, given the rather limited purpose for which intervention is being allowed, under the provisions of Rule 24(a)(2) or 24(b)(2).

The court denied the requests for intervention by the three organizations, the Ad Hoc Committee, NOW, and the Rank and File Committee. While such organizations may have authority to file charges with the EEOC and even to file lawsuits with respect thereto, they are not "persons aggrieved" for the purpose of any statutory right of intervention under Rule 24(a)(1). In view of the allowed intervention of officers or members of such organizations, it appears that adequate representation is being afforded for any interest the organizations may have. See Rule 24(a)(2) and Hines v. Rapides Parish School Board, 479 F.2d 762 (CA5 1973). Nor, indeed, have the organizations demonstrated a sufficient interest qua organizations to justify the additional problems of management and inconvenience caused by unnecessary intervenors. See Bennett v. Madison County Board of Education, 437 F.2d 554 (CA5 1970); Horton v. Lawrence County Board of Education, 425 F.2d 735 (CA5 1970).

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1. On May 20, NOW was given leave, essentially *nunc pro tunc*, to amend its pleadings, which were filed only on behalf of the organization, to name not more than three individual women who were to be allowed to intervene pursuant to Rule 24-(a)(1) or (b). Such amended pleadings were filed with the court on June 4, 1974.

Such intervention as is allowed is permitted at this time[2] for the limited purposes of seeking to stay or vacate the consent decrees and to question the contemplated releases of back pay claims in connection with the payments of back-pay to electing employees under the decree. While the intervenors are to be bound by the decision made with respect to such limited issues the court does not consider that such intervenors, or any class which they may represent, are at present bound, as a matter of res adjudicata or collateral estoppel, to the terms of the consent decrees themselves.

No evidentiary hearings are needed with respect to the issues on which intervention has been allowed. Based upon responses by counsel to questions posed by the court at the May 20th hearing, it is clear that any additional hearings would merely involve an attempt by intervenors to demonstrate in greater detail the alleged deficiencies and problems presented by the decrees, e.g., that the decrees are somewhat open-ended and that there may be already some understandings or proposals as to the manner in which such details will be resolved.[3] There was no indication, however, that any evidence would be tendered respecting the basic allegations against the decrees which are not apparent upon the record. Moreover, time weighs heavy in this dispute, for not only must implementation go forward to meet timetables in the decree, but also delay would adversely affect many of the admittedly prophylactic provisions of the decrees to the detriment of the beneficiaries of Title VII. As the court is convinced that the suggested evidence would not materially contribute to the resolution of the limited issues upon which intervention has been allowed, there is no sound reason to schedule an evidentiary hearing.

**Alleged Illegality of Consent Decree**

Intervenors attack the consent decree on various grounds of alleged illegality, including vagueness; venue deprival; lack of advance notice, enforcement by violators; insufficiency of relief; direct interference with rights of individuals to file, maintain or pursue individual remedies; and a renunciation of statutory responsibility by executive agencies.

Without here separately listing the considerations involved in each of these thrusts, the court concludes that, as attacks on the decrees as a whole, they are due to be denied and overruled, and that the intervenors do not demonstrate or suggest anything illegal, improper or fundamentally unsound in these decrees, which, it should be emphasized, are not binding on individual employees.

By undertaking to resolve by settlement the myriad of problems regarding employment discrimination in the steel industry—discussions to which individual employees and their supporting organizations were not privy—the executive agencies have not renounced their statutory responsibilities as alleged. Such efforts are consistent, not inconsistent, with the statutorily mandated duty of conference, conciliation and persuasion embodied in Title VII. It moreover appears that the commitment[4] undertaken by the government with respect to pend-

2. This is without prejudice to the rights of individuals to seek further intervention, in accordance with the rulings herein, respecting specific questions which have arisen or may arise in the future. See Hines v. Rapides Parish School Board, 479 F.2d 762 (CA5 1973). The limitation upon present intervention is placed so that the resolution of the fundamental questions will not be delayed by disputes over matters which, in essence, are details.

3. See note 2 supra.

4. A letter from the original parties herein was received by the court on June 3, 1974. Such has been filed on record as it serves to clarify the obligations of the United States with respect to future action pursuant to the consent decrees. Nor would it be sound to assume that the government can not oppose relief sought by a private litigant: for example, if a particular black plaintiff, due to his own situation, were to seek an occupational seniority rule considered by the EEOC to be generally adverse to the interests of other black employees, it could hardly be asserted that the EEOC is bound to advocate such relief.

BLEED THROUGH

ing or future Title VII litigation involving these defendants does not preclude the government from advocating, and bringing expeditiously into court if a satisfactory resolution is not accomplished through the settlement procedures established, a claim for other relief by an aggrieved employee.

The court does recognize that these decrees may, as a practical matter, impede, if not impair, some interests of private litigants. Indeed, it must be assumed that concessions during settlement negotiations were motivated in part by the desire of the parties to avoid, by anticipatory corrections, future litigation and to provide more expeditious solutions even in matters already in the judicial processes. Justice delayed may, it is said, be justice denied. Moreover, it must be kept in mind that resolution in this forum of issues between the government and the defendants does not preclude additional—or even inconsistent—relief in favor of parties in other litigation. As stressed by Congress in the passage of Title VII and its amendments, settlement offers the principal hope for rapid correction of the ills of employment discrimination, preserving, however—as here—the right to litigate where the persons aggrieved are not parties to the conciliation agreement and believe the settlement to be unsatisfactory.

Some of the wording of the consent decrees may on its face improperly affect the maintenance of private actions. For example, the decrees provide for mailing of back-pay notices even to those involved in pending legislation as named plaintiffs or as determined or putative class members. In view of the court's retained powers and in view of the presence of the parties to this litigation before other forums, such problems, as they are identified, can be satisfactorily resolved, and no doubt there will be a need from time to time for liaison and co-ordination between this court and other forums. The decrees may require clarification in some particulars and, indeed, as administration of the decrees continues, there will doubtless be problems which were not considered or anticipated by the parties or which run counter to their expectations during negotiations. Should such eventualities occur, the court, by virtue of paragraph 20 [5] of Consent Decree I and paragraph 2 [6] of Consent Decree II, has jurisdiction of this cause for the purpose of issuing subsequent orders, consistent with principles of due process, as necessary to further the purposes and objectives of these decrees.[7]

The court finds nothing illegal respecting the consent decrees themselves, neither in the basic approach to settlement reflected therein, the way in which such were negotiated and entered, nor the manner in which such will be implemented. Parenthetically, the court notes that the suggestion that advance notice was a requirement for the decree—which does not rise to the status of a class

5. "20. Retained Jurisdiction—The court hereby retains jurisdiction of this cause for the purpose of issuing any additional orders or decrees needed to effectuate, clarify or enforce the full purpose and intent of this Decree.

Anytime after the conclusion of five (5) years from the date of this decree, any party may move to dissolve this decree in whole or in part."

6. "2. The court hereby retains jurisdiction of this cause for the purpose of issuing any additional orders or decrees needed to effectuate, clarify or enforce the full purpose and intent of this decree and/or the agreement attached hereto.

Anytime after the conclusion of five (5) years from the date of this decree, any party may move to dissolve this decree in whole or in part."

7. By letters of June 3, 1974, referred to in note 4 supra, the original parties herein have stated that all parties accept the court's view of authority to review any action taken pursuant to the decrees, including actions of the Audit and Review Committee, whether or not any party requests such review. Also, such parties, while perhaps disagreeing with the court as to the limits involved, acknowledge the concept of retained jurisdiction with respect to the effectuation of the full purpose of the decrees. Notwithstanding any such disagreement with the court's view of such powers, the parties advised the court "that none of them wishes to cancel or revoke its consent or withdraw from the Consent Decrees in the above-captioned case."

action decree—would likely haunt, if adopted by the court, the intervenors and their sponsoring organizations in other litigation. Cf. Eisen v. Carlisle & Jacquelin, 42 LW 4804 (May 28, 1974).

**Alleged Illegality of Back-Pay Release**

In connection with the claim of illegality, some intervenors have raised the question of the binding effect of a release executed by employees who accept back-pay under the decree. The consent decree, however, while providing for the use of such a release, does not contain a judicial finding or conclusion that such could be efficacious. This is an issue in which all parties have an interest and, as a practical matter, is in need of a present resolution. The basic question is whether a signed release in exchange for the payment of back-pay determined under a settlement procedure, as contemplated in paragraph 18(g) of Consent Decree I, can be valid as a matter of public policy.

Intervenors cite, among other similar decisions, Schulte v. Gangi, 328 U.S. 108 (1946), an FLSA case, for the proposition that such a release would be invalid as contravening public policy. Such FLSA cases are, however, distinguishable from the instant case. Relief under the FLSA is defined, 29 U.S.C.A. § 216(c), while Title VII relief is more flexible, 42 U.S.C.A. § 2000e-5(g). While the amount of back-pay for an FLSA violation is, essentially, a matter of simple calculation subject only to the statutory requirements of the Act, Title VII back-pay awards are much more difficult of ascertainment as such are subject to innumerable variables. Schulte seems to be most concerned with the leverage afforded employers *if* employees could be persuaded or coerced into waiving statutory pay minimums.

The legislative history of Title VII, as well as the Act itself in providing substantial mechanisms for conciliation and settlement, 42 U.S.C.A. §§ 2000e-5(b) and (f), indicates a Congressional desire for out-of-court settlement of Title VII violations.

In Alexander v. Gardner-Denver Co., 42 LW 4212, 4219 (1974) the Supreme Court indicates that there presumably may be an effective release of Title VII claims where the parties enter into a voluntary settlement. For such a waiver to be effective, however, the employee's consent to the settlement must be both "voluntary and knowing". Id. at 4219 n.15. See also Pettway v. American Cast Iron Pipe Co. 494 F.2d 211 at notes 152 and 156a (CA-5 # 73-1163, 1974), in which the Fifth Circuit seems to indicate its approval of voluntary settlement of similar issues.

This court concludes that there can be a legal waiver of back-pay claims where, for valuable consideration, a release is signed knowingly and voluntarily, with adequate notice which gives the employee full possession of the facts. Such a ruling, however, is not to be taken as a prospective ruling on the question of the efficacy of any particular release, as such would require an individual determination of the factul setting in which such release may be executed.

**Conclusion**

For the reasons indicated, the court has allowed intervention by the individual petitioners for the limited purposes of seeking to stay or vacate the consent decrees and of challenging the legal efficacy of settlement release of back-pay claims and has denied the claims of such intervenors with respect thereto. Intervention by other petitioners or for other purposes has, at present, been denied. By separate document, the order of the court with respect to such matters is filed concurrently herewith.

**Order**

In accordance with the Memorandum of Opinion filed concurrently herewith, it is ORDERED, ADJUDGED and DECREED as follows:

(1) The following petitioners are hereby allowed to intervene for the limited purposes of seeking to stay or vacate the

BLEED THROUGH

consent decrees and of challenging the legal efficacy of settlement releases of back-pay claims: Sidney S. Harris, Willie J. Fonville, Paige A. Millhouse, John S. Ford, Willie Cain, Willie L. Coeman, Joe N. Tayor, Robert Cain, David Bowie, Earl Bell, Bernard Lane, Ellis Lewis, Levy Mazyck, George Mercer, Robert Skates, Jimmie L. Rogers, John A. Turner, John Taylor, Luther Reden, C. L. Garland, L. C. Waker, James L. Allen, Joseph Kimbrough, Joe Bryant, Joseph Faulkner, Isaiah Hayes, III, K. D. Pender, Charles R. Brown, Robert L. Hill, William R. Tilghman, Albert Everett, Nathaniel King, Roy Walker. Cathlene Beasley, Lessie O. Bolin Fix, Bonnie Halascak and George Edwards. Their intervention for purposes other than those specified is, at present, hereby denied.

(2) The requests of the National Organization of Women, the National Ad Hoc Committee of Steelworkers and the National Steelworkers Rank and File Committee for intervention herein are hereby denied.

(3) The limited claims of the intervenors, for which intervention is allowed, are hereby denied and overruled.

(4) Each party, intervenor, and petitioner is to bear its own costs.

MAR 5 1976
MICHAEL RODAK, JR., C

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975
No. 75-1008

SIDNEY S. HARRIS, *et al.*,

*Petitioners,*

v.

UNITED STATES OF AMERICA, *et al.*,
ALLEGHENY LUDLUM INDUSTRIES, INC., *et al.*,
and UNITED STEELWORKERS OF AMERICA,
AFL-CIO-CLC,

*Respondents.*

No. 75-1005

NATIONAL ORGANIZATION FOR
WOMEN, INC., *et al.*,

*Petitioners,*

v.

UNITED STATES OF AMERICA, *et al.*,
ALLEGHENY LUDLUM INDUSTRIES, INC., *et al.*,
and UNITED STEELWORKERS OF AMERICA,
AFL-CIO-CLC,

*Respondents.*

*PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT STEEL COMPANIES

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## TABLE OF CONTENTS


PAGE

Statutes Involved ..... 1

Statement of the Case ..... 2

Argument ..... 7

I. The Asserted Partial Invalidity of the Release Does Not Warrant Granting A Writ of Certiorari ..... 7

A. *No Question of Importance Is Presented* 7

B. *There Is No Conflict of Decision* ..... 11

C. *The Decision Below Is Clearly Correct* ... 15

II. The Denial of Intervention to NOW Does Not Warrant Review by Certiorari 17

III. This Court Should Not Grant the NOW Petition to Determine Whether the District Court Erred in Approving the Consent Decrees ..... 20

Conclusion ..... 23

Appendix—Title VII of the Civil Rights Act of 1964, Section 707, *as amended*, 42 U.S.C. § 2000e-6 (Supp. III, 1973) ..... A1

## TABLE OF AUTHORITIES

PAGES

CASES:

*Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974) ..... 11-14

*American Finance System, Inc.* v. *Harlow*, 65 F.R.D. 572 (D. Md. 1974) ..... 17

*Bing* v. *Roadway Express, Inc.*, 485 F.2d 441 (5th Cir. 1973) ..... 22

*Bryan* v. *Pittsburgh Plate Glass Co.*, 59 F.R.D. 616 (W.D. Pa. 1973), *aff'd*, 494 F.2d 799 (3d Cir. 1974), *cert. denied*, 419 U. S. 900 (1975) ..... 17

*Donaldson* v. *United States*, 400 U.S. 517 (1971) .. 20

*EEOC* v. *American Tel. & Tel. Co.*, 365 F. Supp. 1105 (E.D. Pa. 1973), *aff'd in part, appeal dismissed in part*, 506 F.2d 735 (3d Cir. 1974) ... 16

*Hecht* v. *Cooperative for American Relief Everywhere, Inc.*, 6 F.E.P. Cases 1075 (S.D.N.Y. 1973) 17

*Meat Cutters* v. *Safeway Stores, Inc.*, 6 F.E.P. Cases 14 (D. Ka. 1972)..... 17

*Partee* v. *Pic-Walsh Freight Co.*, 7 F.E.P. Cases 1315 (W.D. Tenn. 1972) ..... 17

*Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683 (1961) ..... 19

*Trbovich* v. *UMW*, 404 U.S. 528 (1972) ..... 20

*United States* v. *City of Jackson*, 519 F.2d 1147 (5th Cir. 1975) ..... 6

*United States* v. *Georgia Power Co.*, No. 12355 (N.D. Ga., Jan. 31, 1974) ..... 16

*United States* v. *ITT Continental Baking Co.*, 420 U.S. 223 (1975)..... 6

*United States* v. *Johnston*, 268 U.S. 220 (1925) .. 19

PAGES

STATUTES AND ADMINISTRATIVE REGULATIONS:

Executive Order 11246, as amended, 3 C.F.R. 169 *et seq.* (1974) ..... 2

Title VII of the Civil Rights Act of 1964, Section 706(f)(1), *as amended,* 42 U.S.C. § 2000e-5(f)(1) (Supp. III, 1973) .....17-18

Title VII of the Civil Rights Act of 1964, Section 707, *as amended,* 42 U.S.C. § 2000e-6 (Supp. III, 1973) .....2, 17-18

Rule 24(a)(1), (2) and (b), Fed. R. Civ. P. ....17-20

OTHER AUTHORITIES:

1 CCH Emp. Prac. Guide ¶ 1860.15 (1973) ..... 16

RESTATEMENT (SECOND) OF CONTRACTS § 297 (Tentative Draft No. 10, April 18, 1975) ... 6

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*Respondents.*

*PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT STEEL COMPANIES

### Statutes Involved

Section 707 of Title VII of the Civil Rights Act of 1964, *as amended,* 42 U.S.C. § 2000e-6 (Supp. III, 1973), is set forth in the appendix to this brief.

**Statement of the Case**

The present petitions present three narrow issues arising from the innovative effort of the Government, the companies* and the international union to resolve sweeping claims of employment discrimination by means of nationwide consent decrees.

On April 12, 1974, the United States** filed a complaint in the District Court for the Northern District of Alabama (Pointer, J.) against the companies and the United Steelworkers of America (the "union"). The complaint alleged a pattern or practice of discrimination in employment in violation of Section 707 of Title VII of the Civil Rights Act of 1964, *as amended,* 42 U.S.C. § 2000e-6 (Supp. III, 1973), and contractual obligations under Executive Order 11246, as amended, 3 C.F.R. 169 *et seq.* (1974). The filing of the complaint followed upon "more than six months of intensive, hard-fought negotiations" between the plaintiffs on one side and the companies and the union on the other (A. 16a***). Simultaneously with the filing of the complaint, the parties submitted for approval by the court a nationwide settlement in the form of two consent decrees constituting the most significant industry-wide Title VII settlement yet reached.****

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*The respondent steel companies ("the companies"), which comprise most of the basic steel industry, are Allegheny Ludlum Industries, Inc., Armco Steel Corporation, Bethlehem Steel Corporation, Jones & Laughlin Steel Corporation, National Steel Corporation, Republic Steel Corporation, United States Steel Corporation, Wheeling-Pittsburgh Steel Corporation and Youngstown Sheet and Tube Company.

**Plaintiffs in the district court are the United States by the Attorney General, on behalf of the Secretary of Labor, and the Equal Employment Opportunity Commission.

***Citations throughout are to the appendix to the Petition of Sidney S. Harris, *et al.* (the "Harris Petition").

****The consent decrees, in approximate figures, cover 73% of the basic steel industry. They apply to 250 separate plants and 350,000 employees of whom 60,000 are minority and female. Back pay

By May 17, 1974, three organizations, four individuals and six groups of 33 named plaintiffs in six pending private actions moved to intervene for the purpose of vacating the consent decrees. The district court granted intervention to a group of 36 individuals, including the Harris petitioners and the three individuals named in the petition of the National Organization for Women, Inc. (No. 75-1005, "NOW Petition"). Intervention was permitted for the limited purposes of (1) seeking to vacate or stay the consent decrees and (2) questioning the release to be used in conjunction with the back pay tenders to be made under Decree I (A. 6a). The district court denied other motions for intervention, including that filed by NOW, *qua* organization. As the court of appeals noted, however,

> "Among the thirty-six persons as to whom the [district] court allowed intervention by right . . . three were women specifically appointed by NOW at Judge Pointer's request, and represented by NOW's counsel throughout the proceedings."*

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amounting to $30,940,000.00 is offered to about 46,000 of those latter employees. Consent Decree I ("Decree I") takes the form of an injunction applicable to those units in which the terms and conditions of employment are established by national collective bargaining between the companies and the union. It provides for a restructuring of seniority rules and regulations to employ plant continuous service for determinations depending on seniority; specifies procedures respecting transfers, promotions, vacancies, layoffs and recalls; and establishes affirmative action procedures with respect to trade and craft positions, testing and other matters. Employees hired before January 1, 1968, are given a right to transfer to new departments or units with rate retention. Consent Decree II ("Decree II") takes the form of an injunction respecting those aspects of employment such as hiring, initial assignment and promotion to supervisory positions as to which the union has no responsibility.

A further, more detailed description of the decrees is found at A. 17a-23a.

*A. 27a (footnote omitted). NOW also filed a brief and presented oral argument on the merits before the court of appeals on its own behalf, as well as on behalf of three female applicants whom Judge Pointer allowed to intervene (A. 28a).

The district court, after fully hearing the intervenors and the parties, refused to vacate or stay the consent decrees and found the proposed release would be legal and valid if executed knowingly and voluntarily.* The intervenors appealed, again raising numerous objections to the validity of various procedural provisions of the decrees and the proposed release. The Court of Appeals for the Fifth Circuit affirmed the judgment of the district court, stating that:

> "In sum, we adhere to our conclusions that these consent decrees are consistent with the public interest, that they represent a sound and reasonable exercise of the discretion possessed by the executive agencies, and that they implement the policies of Title VII and related laws to an exceptionally thorough degree." (A. 118-119a).

No employee is a party to the decrees, and the decrees do not seek by their terms to bind employees by way of res judicata or estoppel by judgment (A. 23a). As a condition to the receipt of back pay, however, employees are required to execute a release, described in paragraph 18(g) of Decree I,** of any claims to back pay and injunctive relief arising from pre-decree acts, practices or conduct.

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*A. 12a. The district court did not rule upon the efficacy of any particular release, finding that such questions could only be resolved upon examination of the individual factual setting in which the release was executed (A. 12a).

**The original language of paragraph 18(g) of Decree I is set forth in pertinent part at A. 54a-55a. As amended by order of the district court dated January 5, 1976, the third sentence of that paragraph now states:

> "Such release will also bar claims for additional relief of any kind, including injunctive relief and damages, based on alleged injury suffered at any time after April 12, 1974, by reason of continued effects of any such discriminatory acts which occurred on or before April 12, 1974." (A. 126a).

All affected employees have the unfettered option to accept the back pay offer provided under the decree and execute a release or to reject the back pay offer (A. 47a-48a n. 26). The injunctive relief provided by the decree extends to all affected employees regardless of whether they elect to accept the offer and execute the release (A. 47a-48a).

In examining the validity of the proposed release the court of appeals first held that a consent decree could lawfully provide for the release of claims for both monetary relief and injunctive relief arising out of continuing effects of pre-decree discrimination:

> "[I]n order to delineate more precisely the contours of the applicable rule of law, we hold that the employee may release not only claims for additional back pay, but also claims for other relief—including injunctive—provided the released claims arise from antecedent discriminatory events, acts, patterns, or practices, or the 'continuing' or 'future' effects thereof so long as such effects are causally rooted—in origin, logic, and factual experience—in discriminatory acts or practices which antedate the execution of the release, and provided, of course, that the release is executed voluntarily and with adequate knowledge, as described by Judge Pointer." (A. 57a).

The court, however, then analyzed the specific language of paragraph 18(g) of Decree I to mean that the release provided for would not require relinquishment of claims solely for injunctive relief based on continued effects of alleged pre-decree discrimination (A. 58a-59a).

Because that interpretation did not comport with the explicit understanding as to the scope of the release which

the parties had reached in negotiating the decree, the companies and the union moved in the district court in December 1975 to amend paragraph 18(g) to conform its language to the original intent of all parties. Evidence was submitted showing that in the negotiation of Decree I all parties understood and agreed that those who accepted back pay tenders would release *all* claims relating to alleged predecree discrimination, including claims for injunctive relief based on continuing effects of such discrimination. After notice to these petitioners and others, a hearing was held in the district court on January 2, 1976. At that hearing the plaintiffs (the Government) acknowledged on the record that the "defendants accurately characterize[d] the true agreement reached by the parties" (A. 120a-121a).

After that hearing, the district court, on January 5, 1976, considered the Harris petitioners' objections, granted the amendment* and denied intervention except for the limited purpose of filing a motion to reconsider the amendment and conducting discovery in support of such a motion. The district court also granted intervention to certain of the Harris petitioners regarding the proposed notice of rights and release, but approved that notice and the release after making certain revisions (A. 126a-127a). The Harris petitioners are presently conducting discovery in the dis-

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*The district court approved the amendment upon traditional contract principles. As stated by this Court in *United States* v. *ITT Continental Baking Co.*, 420 U. S. 223, 236-37 (1975) (footnote omitted):

> "[S]ince consent decrees and orders have many attributes of ordinary contracts, they should be construed basically as contracts. . . ."

*Accord, United States* v. *City of Jackson*, 519 F. 2d 1147, 1151 (5th Cir. 1975) ("A consent decree is in many respects a contract between the parties thereto").

The applicable rule of law where a contract does not accurately express the agreement of the parties is stated in RESTATEMENT (SECOND) OF CONTRACTS § 297 (Tentative Draft No. 10, April 18, 1975). See A. 120a-122a for the district court's discussion of these principles.

trict court on the amendment issue. The Harris petitioners appealed the January 5 order to the Fifth Circuit and acknowledge that neither that order nor the issues decided therein are ripe for review by this Court (Harris Petitioners' Motion to Defer Consideration, ¶¶ 1-2).*

Also on January 5, 1976, the district court denied a motion to stay the back pay offer. On January 28, 1976, the Fifth Circuit denied a similar motion for a stay and a petition for mandamus. Mr. Justice Powell denied a similar motion for stay on February 19, 1976.

As of the date of filing of this brief, the back pay offer has been made, pursuant to the notice of rights and release approved by the district court, to employees at approximately 240 plants where no private actions are pending. Tender to employees at the remaining dozen plants either has been or will be made after approval of the notice and release by the district courts where those private actions are pending.

## Argument

### I.

### THE ASSERTED PARTIAL INVALIDITY OF THE RELEASE DOES NOT WARRANT GRANTING A WRIT OF CERTIORARI.

### A. No Question of Importance Is Presented.

The significance of the consent decrees as instruments for enforcement and resolution of employment discrimination disputes on an industrywide basis does not imbue the narrow question presented by the Harris and NOW petitioners with importance or timeliness sufficient to warrant consideration by this Court on certiorari.

First, even if the release were held invalid insofar as it requires giving up a right to sue for additional monetary

*The NOW petitoners took no part in the January 1976 proceedings in the district court.

or injunctive relief against continued effects of alleged pre-decree discriminatory acts, it is inconceivable that any significant number of individuals who signed the release would benefit thereby.

Both the question presented and petitioners' entire argument assume a state of facts that the court of appeals correctly characterized as an "inconceivable possibility"*—namely that the companies and the union will, in spite of the decrees, take no corrective action to eliminate the effects of pre-decree discrimination. That assumption is tenable only if one ignores the fact that the injunctive provisions of the decrees, the adequacy of which has never been challenged by the Harris petitioners (A. 52a), have been in effect for more than a year and one-half and the major changes in the industry seniority system and the initial reviews thereof have been largely completed.**

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*Referring to the release of claims for additional monetary relief, the Fifth Circuit stated:

> ". . . all an employee really waives in terms of 'continued effects' by signing a release is his or her *speculative* accrual of further damages due to the *inconceivable possibility* that the defendants would take no corrective action whatsoever subsequent to the entry of the consent decrees." (A. 60a; emphasis added).

**The Harris Petition attempts to convey by careful innuendo the impression that the companies and union are continuing admitted preexisting discrimination. Petitioners assert, in the face of an explicit denial in both decrees (A. 60a), that all the companies "maintained segregated departments" at most of their plants (Petition, p. 7). They imply, without a shred of support in the record, that the decrees have done nothing to correct that fictitious situation (*id.*, p. 8, "[u]ntil the seniority system is overhauled . . ."; "to the extent that the government is unable or unwilling to negotiate reform . . ."). They suggest, again without evidence, that there is doubt as to compliance (*id.*, p. 11, "*whether* the defendants [will be] *prompted by the consent decrees* [to] reform their seniority system . . . is . . . a matter of conjecture" (emphasis added)). In fact, the reforms required by the decrees have been in effect at all major plants since August 1974, and thousands of employees have already benefitted from the liberalized transfer provisions, use of plant service, rate retention and other corrective measures.

Moreover, petitioners' arguments depend upon the incredible assumption that the "plenary" power of the district court under its retained jurisdiction (A. 77a, 82a, 105a), the contempt power (A. 60a) and the pervasive reporting requirements and monitoring by Government agencies (A. 103a-104a) provide no incentive for compliance. Petitioners have abandoned their challenges (strenuously urged upon the court below (A. 82a-105a)), to the adequacy of the reporting provisions and the extent of the supervisory powers of the Government agencies and the district court. The assumption that a significant number of employees who signed the release will have cause to sue because defendants will not continue to comply with the decrees, is the same sort of "last-ditch" assumption soundly rejected by the court of appeals which found no evidence in the record to suggest that the parties "did not sincerely mean what they said" (A. 105a).*

Second, the question presented does not warrant review because it would require this Court to determine the validity of the provisions of the release based on a hypothetical judgment which the court below found could only be made with reference to the facts of a particular case. The court of appeals found that whether a particular instance of noncompliance (assuming it were to occur) would give rise to a new claim for relief not barred by the release or would constitute a failure to remedy continued effects of past discrimination would depend on the circumstances of the particular case (A. 59a).

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*Petitioners also ignore the fact that the decrees provide a mechanism for resolution of complaints which is available whether or not an employee has signed a release. Implementation Committees are established at each major plant. An industrywide Audit and Review ("A & R") Committee, composed of management, union and Government members, each constituency having equal voting power and authority, is charged with monitoring compliance with the decrees. Matters which the A & R Committee cannot resolve unanimously may be brought before the district court (A. 18a-19a).

By finding that it could not resolve such questions in a factual vacuum, the court of appeals did not leave "in doubt" a question of "critical importance" to this case or any "segment of American industry" (Harris Petition, p. 11). It merely followed the usual and prudent course of declining to render an advisory opinion which could not possibly take into account the varying situations which might arise in the future.

Third, the question whether a release of claims for injunctive relief against continued effects of pre-decree acts is invalid is, by the Harris petitioners' own concession, not properly before this Court or ripe for determination (Motion to Defer Consideration, ¶¶ 1-2). That question is not properly before the Court because (a) as the Fifth Circuit interpreted the original language of paragraph 18(g), the release did not include such claims (A. 57a-59a) and (b) the issue whether the release can include claims for injunctive relief from "continued effects" is presently before the district court and the court of appeals.* Since the issue may be mooted by developments below (Motion to Defer Consideration, ¶ 2) or may later be presented to this Court upon an appropriate record, review, if any, by this Court should await further action of the lower courts.**

Finally, contrary to petitioners' implication (Harris Petition, p. 9), denial of the petition will not substantially increase the volume of future litigation before the lower courts. Within the next three months the tender of back

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*See pp. 7-8, *supra*.

**Deferral, however, would only serve to keep the injunctive release question improperly before this Court. At some later time the Harris petitioners may develop a suitable vehicle for review of the question presented. If they succeed, a new petition may be filed at the appropriate time. If they do not develop a suitable vehicle for review, no purpose would be served, two or three years hence, by breathing life into the present petition, which they concede is unsuitable (Motion to Defer Consideration, ¶¶ 1-2, 4).

pay to virtually all affected employees will have been completed. If this Court grants certiorari, employees who have accepted the back pay and signed the release will, if anything, be encouraged to sue for more relief in the hope that the release may be found invalid. Moreover, if the writ is granted and it is held that a release of accrued claims, causally rooted in acts prior to a consent decree, knowingly and voluntarily executed in exchange for valuable consideration, could not validly bar future suits by dissatisfied releasors on the same Title VII claim, litigation would be generated that would occupy the federal courts for years to come.* The Fifth Circuit aptly described the consequences of such a holding:

> "Very frankly, we cannot conceive of how any employment discrimination dispute could ever be resolved outside, or indeed inside, the courtroom, if defendants were forbidden to obtain binding, negotiated settlements. No defendant would ever deliver money, promises, or any other consideration—not even a peppercorn—except after entry of a contested, final court order, and even this, on appellants' reasoning, might not end the matter. The EEOC and judicial caseloads would swell to chaotic dimensions. . . . Such a doctrine is unheard of." (A. 69a-70a)

**B. There Is No Conflict of Decision.**

Petitioners' central argument with respect to the release is bottomed on a laboriously constructed but nonexistent conflict between the decision below and this Court's

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*As is pointed out at pp. 15-17, *infra*, the release here in question is substantially similar in scope and effect to releases executed by thousands of claimants in other Title VII litigation.

decision in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974). Beginning with the assumption that it "will not be known for several years" and is now "a matter of conjecture" (Harris Petition, pp. 8, 11), whether the decrees will eliminate the continued effects of past discrimination and whether the defendants will comply with the decrees, petitioners argue that the releases contemplated by Decree I will require employees to waive "prospective" rights contrary to *Gardner-Denver**.

The court of appeals disposed of the asserted conflict as an "attempt to obfuscate the issues by mixing several distinct ideas, including election of remedies, prospective waiver, liquidated as opposed to unliquidated damages, and congressional policies underlying different statutes" (A. 65a-66a).

*Gardner-Denver* dealt with the doctrine of election of remedies, which has no relevance to the present case. There, an employee submitted a claim to arbitration under a collective bargaining agreement and the arbitrator found that he was discharged for just cause. In the employee's subsequent Title VII action claiming the discharge was racially motivated, the employer argued that the employee, by submitting his claim to arbitration, was precluded from suing under Title VII. 415 U. S. at 43. This Court held that resort to arbitration to enforce contractual rights did not, under the election of remedies doctrine, preclude a subsequent suit, *id.* at 49-50, since the remedies under Title VII were intended to be "parallel or overlapping" and "submission of a claim to one forum does not preclude a later submission to another". *Id.* at 47-48.

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**Gardner-Denver* is the sole case relied upon by petitioners in support of their assertion that the holding below was erroneous; they cite no conflicts of decisions among the courts of appeal.

Justice Powell was careful to distinguish, however, between a waiver by election of remedies (resort to a parallel forum) and the ordinary release of a cause of action:

> "Although presumably an employee may waive his cause of action under Title VII as part of a voluntary settlement, mere resort to the arbitral forum to enforce contractual rights constitutes no such waiver. . . .
>
> * * *
>
> "In this case petitioner and respondent did not enter into a voluntary settlement expressly conditioned on a waiver of petitioner's cause of action under Title VII. In determining the effectiveness of any such waiver, a court would have to determine at the outset that the employee's consent to the settlement was voluntary and knowing." 415 U.S. at 52 & n. 15.

Petitioners continue their "attempt to obfuscate" by equating the principle of election of remedies with a voluntary and knowing release of a cause of action. They argue that:

> "The waiver in *Alexander* was prospective in that, *although the disputed employer conduct* occurred *before the purported waiver,* the employee committed himself in advance to obtaining only so much relief as the arbitration would thereafter award." (Harris Petition at 13) (emphasis added).

There was *no* "waiver" in *Gardner-Denver.* The fact that the employee "committed himself in advance" to the arbitral forum was explicitly distinguished from a voluntary and knowing release of a cause of action for good consideration. If there had been a release of the cause of action in

*Gardner-Denver* pursuant to a voluntary settlement, it would have been valid under the principles stated therein, although the basis of the claim released would still have been "disputed employer conduct [which] occurred before the . . . waiver".

The release in this case does not involve "a waiver in advance of a controversy" (A. 63a). Here,

> "[A]ll the ingredients of controversy to be compromised under [the release provision] have their operative and legally consequential origin in acts, patterns, and practices which were performed by the defendants up to and including April 12, 1974 [the date of the consent decrees]. Those operative ingredients are thus antecedent to any possible compromise, *not prospective.*" (A. 63a-64a) (emphasis added).

*Gardner-Denver,* therefore, directly supports the holding of the court below. This Court stated that a waiver of an employee's "cause of action" under Title VII pursuant to a voluntary settlement expressly conditioned upon such waiver would be valid if voluntary and knowing. The companies seek no more in the instant case. For those employees who elect to accept the offer of back pay, the release accomplishes no more than a waiver of the possibility of bringing an independent suit for additional relief based on claims under Title VII and related discrimination laws arising from acts performed on or before April 12, 1974. If an employee has an accrued cause of action based on alleged prior discrimination, he can sue for damages or injunctive relief for both past and continued effects of the challenged acts. There is no reason why he should not be given the option to settle and release that cause of action in its entirety.

Accordingly, the district court and the Fifth Circuit did not err in finding no conflict with *Gardner-Denver* (A. 11a, 69a).

**C. The Decision Below Is Clearly Correct.**

The claims to be released pursuant to paragraph 18(g) of Decree I are only those arising from conduct, acts or practices "occurring on or before the date of entry of this Decree" (A. 55a). The release required by Decree I is similar to other releases commonly used under Title VII. Petitioners' argument, if accepted, would nullify the congressional selection of "[c]ooperation and voluntary compliance" as the "preferred means" for resolving employment discrimination disputes, *Gardner-Denver, supra,* 415 U. S. at 44 (A. 44a), and wholly or partially invalidate releases signed by thousands of individuals in other proceedings.

When the EEOC succeeds in a conciliation effort under § 706(f)(1), 42 U.S.C. § 2000e-5(f)(1), and obtains a conciliation agreement with the employer to which the charging party becomes a party by acceptance of the agreement and the benefits thereof, the EEOC customarily inserts a "Waiver and Release, Conditional upon Performance" clause in the agreement, of which the following is typical:

> "The Charging Party deems this Agreement to be fair and equitable, and hereby waives, releases and covenants not to sue the Respondent with respect to any matters which *were or might have been alleged* as charges filed with the [EEOC] subject to performance by the Respondent of the promises and representations contained herein. . . ." (A. 70a & n. 37) (emphasis added).

That release expressly bars suit upon all matters which *were* or *might have been* alleged as charges. It clearly encompasses and thereby bars a later suit for additional relief

based on the same claim. As the court of appeals stated, to find such a release invalid would be "contrary to the policies and procedures that heretofore have been followed in employment discrimination cases" and would deprive the employee of the chance to make a choice, not otherwise available, which "does not cost the employee a wink" (A. 70a).

The Fifth Circuit also noted (A. 55 n. 30) that the instant release provision was patterned after the release utilized in the nationwide Bell System consent decree, *EEOC* v. *American Tel. & Tel. Co.*, 365 F. Supp. 1105 (E.D. Pa. 1973), *aff'd in part, appeal dismissed in part,* 506 F.2d 735 (3d Cir. 1974), which provided as follows:

> "The Bell Companies may require that acceptance by any person of individual relief pursuant to the terms of Part A, Section III [back pay relief], shall constitute a waiver and release by such person of *any* claims for alleged violations of Title VII . . . , 42 U.S.C. §§ 1981, 1983, Executive Order 11246, or any applicable state fair employment practice laws or regulations *based upon occurrences prior to the date of this Agreement and the Decree. . . .*" 1 CCH Emp. Prac. Guide ¶ 1860.15 (1973) (emphasis added).

The Bell System release covers any claims "based upon occurrences prior to" the date of the agreement and decree, including claims for additional relief allegedly due as a result of continued effects of the same prior occurence (A. 55a n. 30).

The simple truth of the matter is that such releases are commonplace in Title VII litigation* and, indeed, in almost all litigation. They cannot be read to waive any prospective

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**See, e.g., United States* v. *Georgia Power Co.*, No. 12355 at 14 (N.D. Ga., Jan. 31, 1974) ("Amended and Final Decree" incorporated release covering violations of Title VII and related laws which have occurred "prior to" the entry of the decree), cited at A. 71a

rights, and the decision below approving such a release is correct.

## II.

## THE DENIAL OF INTERVENTION TO NOW DOES NOT WARRANT REVIEW BY CERTIORARI.

The district court denied intervention under Rule 24(a)(1), Fed. R. Civ. P., to NOW *qua* organization on the ground that NOW was not a "person aggrieved" within the meaning of § 706(f)(1) of Title VII, 42 U.S.C. § 2000e-5(f)(1). It denied intervention under Rule 24(a)(2) on the ground that NOW had not demonstrated inadequacy of representation or a sufficient interest in the subject matter of the action (A. 5a*). NOW appealed from that denial, urging that it had an "absolute, unconditional right of intervention" *qua* organization (A. 32a). The Fifth Circuit deferred consideration of the question whether NOW was a "person aggrieved" under Section 706(f)(1) in favor of an approach "more directly dispositive" (A. 33a-34a). It noted that the Government's complaint was filed under Section 707, 42 U.S.C. § 2000e-6, and held that:

> "Nothing in § 707 or in any other federal statute conferred an unconditional right of intervention upon any private individual or association thereof." (A. 35a).

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n. 38; *Bryan* v. *Pittsburgh Plate Glass Co.*, 59 F.R.D. 616 (W.D. Pa. 1973), *aff'd*, 494 F.2d 799 (3d Cir. 1974), *cert. denied*, 419 U.S. 900 (1975) (on delivery of settlement checks, "all defendants shall be released of and from any and all obligations, claims, demands, and causes of action" which any class member may have against them); *Hecht* v. *Cooperative for American Relief Everywhere, Inc.*, 6 F.E.P. Cases 1075 (S.D.N.Y. 1973); *cf.*, *American Finance System, Inc.* v. *Harlow*, 65 F.R.D. 572 (D. Md. 1974); *Partee* v. *Pic-Walsh Freight Co.*, 7 F.E.P. Cases 1315 (W.D. Tenn. 1972); *Meat Cutters* v. *Safeway Stores, Inc.*, 6 F. E. P. Cases 14 (D. Ka. 1972).

*References, for consistency, are to the appendix to the Harris Petition.

Although the Fifth Circuit considered the matter "mostly ended" with its holding that NOW had no statutory right of intervention under Rule 24(a)(1), (A. 39a), it further held that the district court did not err in denying intervention to NOW under Rule 24(a)(2) or (b). (A. 39a-42a) The Fifth Circuit accordingly dismissed NOW's appeal *qua* organization for want of jurisdiction (A. 29a, 42a).

NOW argues that Section 707(e) incorporates all Section 706 procedures into actions brought pursuant to Section 707, including a statutory right to intervene after a pattern or practice suit has been filed by the Government (NOW Petition, p. 6). The legislative history, however, supports the Fifth Circuit's determination that Congress did not intend to incorporate anything other than the administrative procedures of Section 706 into actions under Section 707*.

In reaching the conclusion that no statutory right of intervention exists, the court of appeals reviewed exhaustively that legislative history, the language of the statute and the decisions cited by NOW (A. 32a-39a). It noted that Section 707 was intended to provide the Government with a "swift and effective weapon to vindicate the broad public interest in eliminating unlawful practices, at a level which may or may not address the grievances of particular individuals" (A. 35a). It also noted that it was influenced by the "strong judicial policy against nonexpress private intervention in government enforcement litigation when an adequate private remedy is freely accessible" (A. 37a). This Court has been similarly reluctant to imply a right of

*The House Committee on Education and Labor described Section 707(e) as a measure which "[a]ssimilate[d] procedures for new proceedings brought under Section 707 to those now provided for under Section 706 so that the Commission may provide an *administrative procedure* to be the counterpart of the present Section 707 action" (A. 36a-37a at n.19, emphasis added).

intervention under a statute which gives a private party an independent right of action. *See Sam Fox Publishing Co.* v. *United States,* 366 U. S. 683 (1961).

On the facts before it, the court of appeals' affirmance of the denial of intervention to NOW, *qua* organization, under Rule 24(a)(2), was also clearly correct and does not merit review. The court found that entry of the decrees did not "operate to impair or impede the protection" of any interest NOW might have, because neither NOW nor its members are bound by the decrees and have "plenary legal remedies . . . fully available" (A. 39a-40a). Moreover, on the record, NOW had made "no colorable showing of inadequacy in the government's representation of the public interest" (A. 41a).

The court of appeals also held that NOW had shown no abuse of discretion in the district court's denial of permissive intervention under Rule 24(b) and that the district court was "clearly" justified in determining that "the interests of the majority of the affected individuals predominated over NOW's interest in further delaying implementation of the decrees' reforms" (A. 41a). Since certiorari is not granted "to review evidence and discuss specific facts", *United States* v. *Johnston,* 268 U.S. 220, 227 (1925), review of the conclusions of the court of appeals is inappropriate.

In addition, review is unjustified because NOW's interests were fully protected throughout the proceedings below by its participation through nominees and counsel (A. 41a). NOW filed an amended complaint in intervention on behalf of the three female petitioners permitted by the district court to intervene (A. 27a & n. 11). NOW filed "extensive briefs" before Judge Pointer "concerning the effects of the consent decrees upon the rights of females" (*id.*) and filed a brief and presented oral argument before

the Fifth Circuit on behalf of those three women (A. 28a). The fact is that NOW's interests are being represented by the three petitioners as "adequately" as NOW itself can represent those interests and that fact should foreclose any inquiry into the propriety of the lower court's application of Rule 24(a)(2).

The decisions cited by NOW, apparently in support of its claim under Rule 24(a)(2), are inapposite. The decision of this Court in *Trbovich* v. *UMW*, 404 U.S. 528 (1972), was adequately distinguished by the Fifth Circuit (A. 40a n. 21). In *Trbovich*, suit by the Government was the exclusive remedy under the statute involved; Title VII allows private suits. *Trbovich* is also distinguishable on the ground that NOW's interests were adequately represented in this proceeding by three female petitioners represented by counsel for NOW.

The other cases which NOW cites (Petition, p. 7) either *denied* intervention because of a failure to meet Rule 24(a)(2) requirements* or granted intervention because the petitioner showed substantial and direct interest which was affected by the action. Here there was no such showing that the requirements of Rule 24(a)(2) had been met.

## III.

## THIS COURT SHOULD NOT GRANT THE NOW PETITION TO DETERMINE WHETHER THE DISTRICT COURT ERRED IN APPROVING THE CONSENT DECREES.

The NOW petitioners contend that the consent decrees are inadequate in that (1) they fail to correct alleged sys-

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*E.g., *Donaldson* v. *United States*, 400 U.S. 517 (1971). In that case, the Court affirmed a denial of intervention to a third party being investigated by the Internal Revenue Service in an action to enforce summonses for records of the third party's former employer. The Court held that, as petitioner had no proprietary or any other protectable interest such as privilege, he had no right of intervention under Rule 24(a)(2).

tematic discrimination in the 1940's, (2) they base goals for assignment to trade and craft jobs on units in which women are allegedly underrepresented, and (3) they fail to provide seniority carryover or rate retention for certain women. The NOW petitioners argue that for those reasons the district court erred in refusing to vacate the consent decrees (NOW Petition, pp. 8, 12).

The Fifth Circuit thoroughly rejected the NOW petitioners' claims in a manner that requires only brief summarization (A. 114a-117a). First, concerning the alleged exclusion of women in the 1940's, the barriers of limitations and laches are insurmountable. Even if such alleged discrimination occurred and even if those barriers could be surmounted, the result sought by the NOW petitioners would be to invalidate the decrees in their entirety, leaving no relief for those alleged victims of purported discrimination thirty years ago or the approximately 60,000 minority and female employees now receiving the benefits of the decrees.

Second, the NOW petitioners continue to "overlook" (A. 115a-116a n. 87) the specific provision in Decree I that 50 percent of all those promoted into trade and craft jobs shall be minority or female employees. As the number of females in production and maintenance positions rises*, the number of females in trade and craft jobs will correspondingly increase.

Third, the Fifth Circuit held there is no obligation to provide transfer rights across bargaining unit lines (with rate retention and seniority carryover) for "secretaries"

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*The number of females in production and maintenance positions must necessarily increase because Decree II requires that 20% of all new hires for such positions shall be females.

who might wish to become "rail straighteners" (A. 117a). In response to NOW's interpretation of a prior Fifth Circuit decision in *Bing* v. *Roadway Express, Inc.*, 485 F.2d 441 (5th Cir. 1973), (upon which NOW relies in its Petition at 11), the Fifth Circuit stated:

> "We believe NOW places far too general a reliance on *BING*. Truck driving is essentially truck driving, though firms sometimes require more experience for 'road' positions. By contrast, secretarial work and rail straightening are, at least in obvious respects, quite different. . . . Accordingly, we assume from our common experience that clerical-technical-plant security and production-maintenance are basically unrelated occupations." (A. 117a)

Finally, the NOW petitioners ignore the fact that any woman who feels discriminated against either before or after the consent decrees is not barred by the decrees from filing a private action for injunctive relief. Any such woman who is offered back pay under the decrees is free to reject the tender and preserve whatever claims she may have.

The objections to the decrees raised by NOW are without merit. This Court should not grant a writ of certiorari to consider whether to vacate those decrees on the basis of such unfounded allegations.

## Conclusion

For the foregoing reasons, the Harris and NOW Petitions for Writs of Certiorari should be denied.

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# APPENDIX

## Appendix

Title VII of the Civil Rights Act of 1964, Section 707, *as amended*, 42 U.S.C. § 2000e-6 (Supp. III, 1973):

**§ 2000e-6. *Civil actions by the Attorney General.***

**(a) Complaint.**

Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

**(b) Jurisdiction; three-judge district court for cases of general public importance: hearing, determination, expedition of action, review by Supreme Court; single-judge district court: hearing, determination, expedition of action.**

This [sic] district courts of the United States shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, and in any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case. Such request by the Attorney General shall be accompanied by a certificate that, in his opin-

ion, the case is of general public importance. A copy of the certificate and request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

In the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. (Pub. L. 88-352, title VII, § 707, July 2, 1964, 78 Stat. 261.)

**(c) Transfer of functions, etc., to Commission; effective date; prerequisite to transfer; execution of functions by Commission.**

Effective two years after March 24, 1972, the functions of the Attorney General under this section shall be transferred to the Commission, together with such personnel, property, records, and unexpended balances of appropriations, allocations, and other funds employed, used, held, available, or to be made available in connection with such functions unless the President submits, and neither House of Congress vetoes, a reorganization plan pursuant to chapter 9 of Title 5, inconsistent with the provisions of this subsection. The Commission shall carry out such functions in accordance with subsections (d) and (e) of this section.

**(d) Transfer of functions, etc., not to affect suits commenced pursuant to this section prior to date of transfer.**

Upon the transfer of functions provided for in subsection (c) of this section, in all suits commenced pursuant to this section prior to the date of such transfer, proceedings shall continue without abatement, all court orders and decrees shall remain in effect, and the Commission shall be substituted as a party for the United States of America, the Attorney General, or the Acting Attorney General, as appropriate.

**(e) Investigation and action by Commission pursuant to filing of charge of discrimination; procedure.**

Subsequent to March 24, 1972, the Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission. All such actions shall be conducted in accordance with the procedures set forth in section 2000e-5 of this title. (As amended Pub. L. 92-261, § 5, Mar. 24, 1972, 86 Stat. 107.)

MAR 5 1976

IN THE

# Supreme Court of the United States

October Term, 1975

No. 75-1005

NATIONAL ORGANIZATION FOR WOMEN, *et al.*,
*Petitioners,*
v.
UNITED STATES OF AMERICA, *et al.*
AND
ALLEGHENY-LUDLUM INDUSTRIES, INC., *et al.*

No. 75-1008

SIDNEY S. HARRIS, *et al.*,
*Petitioners,*
v.
ALLEGHENY-LUDLUM INDUSTRIES, INC., *et al.*
AND
UNITED STATES OF AMERICA, *et al.*

**On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## BRIEF IN OPPOSITION OF RESPONDENT UNITED STEELWORKERS OF AMERICA, AFL-CIO


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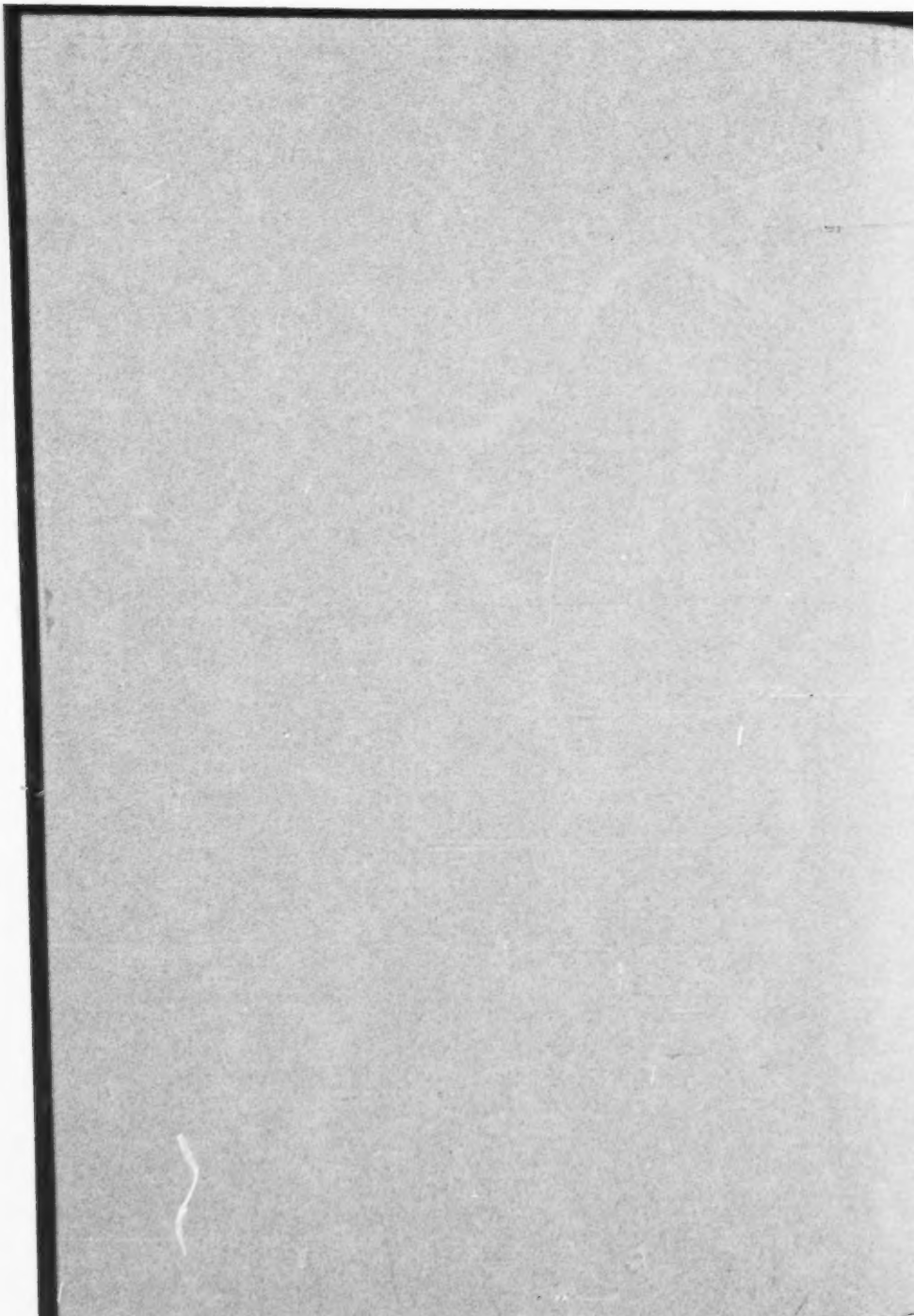

## TABLE OF CONTENTS

*Page*

COUNTER-STATEMENT OF THE CASE ..... 2

ARGUMENT ..... 6

I. NOW's Petition ..... 7

A. Intervention ..... 7

B. Inadequacies of the Consent Decree ..... 8

II. Harris' Petition ..... 9

CONCLUSION ..... 11

IN THE

# Supreme Court of the United States

October Term, 1975

No. 75-1005

NATIONAL ORGANIZATION FOR WOMEN, *et al.*,
*Petitioners,*

v.

UNITED STATES OF AMERICA, *et al.*
AND
ALLEGHENY-LUDLUM INDUSTRIES, INC., *et al.*

No. 75-1008

SIDNEY S. HARRIS, *et al.*,
*Petitioners,*

v.

ALLEGHENY-LUDLUM INDUSTRIES, INC., *et al.*
AND
UNITED STATES OF AMERICA, *et al.*

**On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## BRIEF IN OPPOSITION OF RESPONDENT UNITED STEELWORKERS OF AMERICA, AFL-CIO

United Steelworkers of America, AFL-CIO (hereinafter "the Union") submits this consolidated brief in opposition to the two petitions for certiorari seeking review of

the Fifth Circuit's decision in *United States* v. *Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826.

## COUNTER-STATEMENT OF THE CASE

On April 12, 1974, culminating "more than six months of intensive, hard fought negotiations," 517 F.2d at 834, the three government agencies responsible for enforcing equal employment legislation (the EEOC and the Departments of Justice and Labor) joined with nine major steel companies and the Union in submitting two proposed consent decrees to the district court for the Northern District of Alabama. The decrees were entered that day. The "overriding goal" of all parties, in proposing the decrees, was "comprehensive, final and fair settlement of charges of uniawful employment discrimination arising from patterns and practices alleged upon the part of the companies and the union up to and including the entry date of the consent decrees," *id.* at 837. The three government agencies "have stated in so many words that they consider the decrees remedially adequate to bring the defendants into present compliance with federal anti-discrimination law and to compensate individual employees for the past and continuing effects of the alleged discriminatory practices which the decrees enjoin," *id.* at 838.

The petitions for certiorari seek review of the validity of Consent Decree I, the decree which relates to those matters for which both the companies and the Union have responsibility.[1] As the court below explained, *id.* at 834-835, this decree:

> permanently enjoins the defendants from "discriminating in any aspect of employment on the basis of race, color, sex or national origin and from failing or

[1] Consent Decree II, to which the Union is not a party, deals with those matters under the exclusive control of the companies, e.g. hiring, and filling of supervisory and managerial positions.

refusing to fully implement" the substantive relief set forth therein. The items covered by Consent Decree I are mainly matters historically encompassed by collective bargaining. The substantive relief falls into three basic categories: (1) immediate implementation of broad plantwide seniority, along with transfer and testing reforms, and adoption of ongoing mechanisms for further reforms of seniority, departmental, and line of progression (LOP) structures, all of which are designed to correct the continuing effects of past discriminatory assignments; (2) establishment of goals and timetables for fuller utilization of females and minorities in occupations and job categories from which they were discriminatorily excluded in the past; and (3) a back pay fund of $30,940,000, to be paid to minority and female employees injured by the unlawful practices alleged in the complaint.

Although the Harris petitioners express doubts in *this* Court about the ultimate success of the decree's injunctive reforms[2]—doubts which are not explained or substantiated in any respect—they expressed no similar doubts in the lower courts. Thus, the court below correctly observed that "the Harris appellants have challenged seriously the adequacy of the decrees' injunctive measures neither in the district court nor in this court." 517 F.2d at 851.

With respect to the decree's back pay feature, each employee is afforded an option: he may reject the backpay tender, and remain as free as before to pursue his rights under Title VII (while, incidentally, enjoying the benefit of the non-monetary reforms achieved by the decree), or he may accept the back pay tender by executing a release of all claims against the defendants for pre-decree discrimi-

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[2] "[W]hether, as petitioners contend, the decrees are unlikely to produce meaningful reforms of the seniority systems is a question whose answer will not be known for several years." (Harris Petition, p. 8; see also *id.*, p. 11).

nation or the continuing effects of pre-decree discrimination. Before making this election, each employee will be furnished with extensive information, approved by the decree court (and, at any plant where a private action is pending, by the court presiding over that action as well) designed to assure that the election is an informed one.

Shortly after the decrees' entry, a number of employees and organizations moved to intervene to challenge the decrees' validity and to have them set aside. The district court granted intervention to the employee-movants, but denied intervention to the organizational movants, including National Organization for Women ("NOW"). However, the court allowed NOW to file an amended motion on behalf of three representative female employees "specifically appointed by NOW . . . and represented by NOW's counsel throughout the proceedings," 517 F.2d at 839.

On the merits, the district court concluded that the challenges to the validity of the decrees were without merit. In particular, the court held that the release which employees will sign if they elect to accept the tender of back pay is a valid release, and will bind any employee who executes it knowingly and voluntarily.

The intervenors thereupon appealed, and in August, 1975, the Fifth Circuit issued its 55-page decision upholding the decrees in all respects. The court concluded "that these consent decrees are consistent with the public interest, that they represent a sound and reasonable exercise of the discretion possessed by the executive agencies, and that they implement the policies of Title VII and related laws to an exceptionally thorough degree," 517 F.2d at 881. The court stated that "the remarkable feature of the present decrees is that so many self-interested parties were able to leave so few unresolved remedial issues. The major concessions yielded by the defendants could have been obtained only by all parties to the negotiations working together un-

selfishly toward a settlement keyed to broader public goals," *id.* at 876. The court found this "one of those rare instances in which the government has, to its satisfaction, successfully negotiated a comprehensive voluntary accord," *id.* at 848.

In its opinion, the court below discussed at length each of the arguments advanced by intervenors, and found each without merit. We defer our description of the court's reasoning until the argument section of this brief. One particular, however, warrants mention now. Although the court declared that it would have been *lawful* to condition the back pay tenders upon the waiver of claims for non-monetary relief for continuing effects of pre-decree discrimination, *id.* at 853, the court construed the "plain language" of the decrees in the instant case as not requiring such a waiver, *id.* at 852, n. 30, 853, 856.[3]

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[3] Consent Decree I provided that employees accepting back pay tenders would "be required to execute a release . . . of any claims . . . resulting from any alleged violation . . . occurring on or before the date of entry of this Decree . . . Such release will also bar recovery of any *damages* suffered at any time after the date of entry of this decree by reason of continued effects of any such discriminatory acts which occurred on or before the date of entry of this Decree" (emphasis added). The court concluded that the word "damages" was not susceptible of a construction encompassing non-monetary relief, even though all parties to the decree, in their briefs, indicated that they had *intended* such a construction.

After the decision of the court below, the defendants moved in the district court to amend the decree to state expressly that the release encompasses *all* claims (including non-monetary claims) relating to the continuing effects of pre-decree discrimination. The district court, after ascertaining that all parties to the decree had indeed so intended when they negotiated the decree, granted the amendment as an exercise of the courts' traditional equitable power of reformation: "to make a mistaken writing conform to antecedent expressions on which the parties agreed." 3 Corbin, *Contracts* § 614, at 723 (1960 ed.).

The Harris petitioners have recently appealed this amendment to the Fifth Circuit. Because the district court had denied their motion to intervene to oppose the motion to amend, there is a serious question as to their standing to prosecute the appeal. In an effort to overcome this deficiency, the Harris petitioners also filed a petition for manda-

## ARGUMENT

In this case, the three government agencies responsible for securing equal employment opportunity, after six months of intensive negotiations with the major employers and union in the steel industry, achieved a landmark: decrees radically reforming employment practices throughout an entire industry, and providing 46,000 employees with an immediate opportunity to share in a backpay offer totaling nearly $31 million. A measure of the achievement represented by these decrees is that the reforms extend to employees at 240 plants, even though employees at only 12 of these plants had instituted a Title VII action in the decade since Title VII's passage.

Petitioners have been embarked upon a quixotic quest to topple this unprecedented achievement. Whereas the parties to the decrees expected that the decrees would be a catalyst for similar industry-wide reforms in other industries, petitioners have thus far succeeded by their sheer litigiousness[4] in making the "cost" of such settlements seem prohibitive, and thus have deterred others from following the same path.[5] In consequence, Congress' selection of "co-

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mus, but that petition has been denied by the Fifth Circuit. The "appeal" is still pending; petitioner's motions for expedition of the appeal, and for a stay of the back pay tenders pending appeal, have been denied by the Fifth Circuit.

[4] To provide but a glimpse of the scope of the Harris petitioners' efforts, their attacks upon the decrees are *currently* (i.e. two years after the decrees were entered) pending not only in this Court, but also in the Fifth Circuit (on appeal from amendment of Consent Decree I), in the decree court (on motion for reconsideration of the amendment), and in five private Title VII actions where they are asking the courts to refuse to allow the backpay tenders under Consent Decree I to go forward to the employees at the plants involved in such private actions. These quests have been accompanied by extensive discovery, briefing, hearings and argument.

[5] We are able to state this from direct experience, for this Union—which is obviously committed to the approach taken in the decrees—is also the principal bargaining representative of employees in the aluminum, copper, chemical, lead, zinc, silver, gold, can manufacturing, iron ore, and steel fabricating industries.

operation and voluntary compliance" as "the preferred means for achieving [the] goal" of equal employment opportunity,[6] has been frustrated.

The impetus for industry-wide reform cannot be rekindled until the steel industry decrees have been finally vindicated. If this Court grants certiorari, that cause will be set back yet another year.

This price might be worth paying if petitioners' claims regarding the validity of the decrees were substantial. But the reality is that each of petitioners' claims is frivolous.

## I. NOW's PETITION

NOW advances two contentions, in addition to joining the Harris petitioners' attack upon the release. We deal with the release in Part II. Here, we discuss NOW's claims: (a) that NOW was wrongly denied intervention; and (b) that the decree does not go far enough in extending remedies to women.

### A. *Intervention*

NOW's quest for intervention is of doubtful legal validity —NOW can point to no cases supporting its position—and we doubt that it could be considered worthy of review even if viewed in its own right. But here there is a more basic reason why the intervention question does not warrant certiorari: in the circumstances of this case, the denial of intervention to NOW is of solely academic interest; indeed, unless the decision below is to be reversed on substantive grounds, NOW's quest for intervention is moot.

NOW did not seek to intervene to secure relief for *itself*, but only to secure relief for women whom it claimed to represent. While the district court would not allow NOW to intervene, it granted intervention to three women "specifically appointed by NOW . . . and represented by NOW's

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[6] *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).

counsel throughout the proceedings," 517 F.2d at 839. On behalf of these women, NOW advanced all of the arguments which it would have made had it been allowed to intervene in its own name, *id.* at 839, n. 11. "Having participated through its nominees and counsel during these entire proceedings, NOW cannot be heard to complain of the adequacy of the feminist representation," *id.* at 846.

Thus, even if NOW's intervention claim could be considered significant as an abstract question — which we doubt—it is of absolutely no practical significance in *this* case, where NOW effectively enjoyed all of the prerogatives which intervention would have afforded it. The total artificiality of the issue is evident from the consideration that if this Court reversed on the intervention ground alone there would not even be reason to remand the case, for there is nothing which NOW could contribute on the merits which it has not already had an opportunity to contribute through its nominees.

### B. *Inadequacies of the Consent Decree*

NOW's other challenge is that the decrees do not go far enough; that they leave certain vestiges of discrimination against women unremedied (e.g. the plight of women hired during World War II but fired to make room for returning veterans). With one exception, these claims relate only to women who will not be offered back pay under the decree, and thus who will be as free to seek relief through private actions as they were before the decrees were adopted.[7] As the court below explained: "The decrees themselves are not made unlawful simply because they presently fail to deal with every conceivable allegation of discrimination in the

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[7] We do not mean to suggest that we think the decrees' remedies are in any respect inadequate. On the contrary, we believe—as did the court below, 517 F.2d at 879-881—that the decrees contain the full measure of relief which women could hope to achieve through litigation.

steel industry," 517 F.2d at 881. The one claim which might involve women who will be offered back pay (and who thus may surrender their right to sue)—that relating to the goals for female promotion into trades and crafts—was correctly found by the court below to be frivolous, *id.* at 880.

## II. HARRIS' PETITION

The Harris petitioners focus exclusively upon the validity of the release. They now concede (although they argued strenuously to the contrary below) that an employee may settle his claim for *past* damages for past discrimination. But they continue to insist that (a) an employee may not give up the right to seek *non-monetary relief* for the continuing effects of past discrimination; and (b) an employee may not settle his claim for *damages* for the continuing effects of past discrimination.

As to the first of these claims, it is sufficient to note that the present case, in the posture in which it is now before this Court, does not present the question. The Fifth Circuit construed the consent decree's release provision as *not* encompassing a waiver of claims for non-monetary relief for the continuing effects of past discrimination, *id.* at 852 n. 30, 853, 856. In light of that construction, the validity of such a waiver is not presented.[8]

This leaves, as the only release issue actually ripe for decision, whether an employee may settle his claim for *damages* for the continuing effects of past discrimination. Petitioners' contention that such a claim may not be settled is patently frivolous. It is equivalent to saying that an auto-

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[8] To be sure, events *subsequent* to the decision below have created a situation in which this issue *might* someday come to this Court. The district court has amended the decree to provide for such a waiver, and the Harris petitioners have appealed to the Fifth Circuit raising the very points which they seek to submit, prematurely, to this Court. See p. 5, n. 3, *supra*.

mobile case cannot be settled because the full extent of the victim's suffering (the continuing effects of the past wrong) are not yet known.

As the court below recognized, it is impossible to design a curative system for past assignment discrimination which eliminates all "continuing effects" of that discrimination, i.e. which immediately installs every victim of that discrimination in his "rightful place." (For example, an employee hired twenty years ago and initially assigned to a desirable department might have progressed by now to a highly skilled job; if, instead, he was discriminatorily assigned elsewhere, he will not have received the requisite training during the intervening twenty years to qualify him to immediately assume that job). Accordingly, even after fully-contested litigation the outcome is a curative system under which "many aggrieved employees will not immediately achieve their 'rightful places,' but only a more favorable start on the road toward better jobs," 517 F.2d at 855 (citing cases).

The consent decree in the instant case contains a curative system patterned after those emerging from contested litigation, and in addition provides for a tender of sums to minority and female employees which the government believes "adequate . . . to compensate individual employees for the past *and continuing effects* of the alleged discriminatory practices which the decrees enjoin," 517 F.2d at 838 (emphasis added). Of course, each employee is free to decide that the tendered amount is insufficient and to reject it and sue for more. But surely, in a Title VII case as in any other, parties are entitled to settle on the basis of their predictions of how they would fare in contested litigation. Are employees to be told that they may not have the option of acceptance if that is their preference?

Petitioners claim that a waiver of damages for the continuing effects of past discrimination is "prospective", and

thus impermissible, citing *Alexander, supra,* 415 U.S. at 52. But this is mere semanticism. A waiver is impermissibly "prospective" if the employee licenses *future* discrimination against him. But by definition, we are dealing here only with *past* discrimination (even though the effects may continue to be felt in the future). The court below carefully and repeatedly emphasized that the release does not—and could not lawfully—require a waiver with respect to acts of discrimination occurring after the date of the decree, 517 F.2d at 853-856.

## CONCLUSION

No issue in this case warrants this Court's attention. Some are not even ripe for review. The petitions for certiorari should be denied.

Respectfully submitted,

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# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 2 |
| Questions presented | 2 |
| Statement | 3 |
| Argument | 11 |
| Conclusion | 19 |


## CITATIONS

Cases:


| | |
|---|---|
| *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 | 12 |
| *International Longshoremen's & Warehousemen's Union, Local 37* v. *Boyd*, 347 U.S. 222 | 12 |
| *NAACP* v. *Alabama*, 357 U.S. 449 | 16 |
| *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683 | 15 |
| *Sierra Club* v. *Morton*, 405 U.S. 727 | 17 |
| *Trbovich* v. *United Mine Workers*, 404 U.S. 528 | 15, 16 |
| *United States* v. *Armour & Co.*, 402 U.S. 673 | 17 |
| *United States* v. *Borden Co.*, 347 U.S. 514 | 15 |
| *United States* v. *Raines*, 362 U.S. 17 | 15 |
| *United States* v. *SCRAP*, 412 U.S. 669 | 17 |
| *W. J. Perryman* v. *Penn Mutual Life Insurance Co.*, 324 F. 2d 791 | 13 |
| *Warth* v. *Seldin*, 422 U.S. 490 | 12, 16, 17 |
| *Wilko* v. *Swan*, 346 U.S. 427 | 13 |

Statutes, Executive Order and rules: Page

Civil Rights Act of 1964, Title VII, 78 Stat. 253, *et seq.*, as amended, 42 U.S.C. 2000e, *et seq.* ..... 3, 17

Section 706 ..... 15, 16
Section 707 ..... 15

Executive Order 11246 ..... 3, 17
Federal Rules of Civil Procedure:

Rule 24(a) ..... 7, 14, 15-16
Rule 24(b) ..... 8

Miscellaneous:

FEP Manual 431:125-152 (1974) ..... *passim*

# In the Supreme Court of the United States

OCTOBER TERM, 1975

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No. 75-1005

NATIONAL ORGANIZATION OF WOMEN, INC., ET AL., PETITIONERS

*v.*

ALLEGHENY-LUDLUM INDUSTRIES, INC., ET AL.

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No. 75-1008

SIDNEY S. HARRIS, ET AL., PETITIONERS

*v.*

ALLEGHENY-LUDLUM INDUSTRIES, INC., ET AL.

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*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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**BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION**

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## OPINIONS BELOW

The opinion of the court of appeals (Harris Pet. App. 13a-119a)[1] is reported at 517 F. 2d 826. The district court's June 7, 1974, opinion (Harris Pet. App. 1a-12a) and order (NOW Pet. App. A30-A31)[2] are reported at 63 F.R.D. 1. A later opinion and order of the district court (Harris Pet. App. 120a-127a) are unreported.[3]

## JURISDICTION

The judgment of the court of appeals was entered on August 18, 1975. On November 4 and 6, 1975, Mr. Justice Powell extended the time for filing petitions for a writ of certiorari to and including January 15, 1976, and both petitions were filed that day. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the court of appeals was correct in upholding the validity of a release provision, contained in a consent decree entered in settlement of a government suit to undo patterns and practices of employment discrimination, by which individual employees

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[1] "Harris Pet. App." refers to the appendix to the petition in No. 75-1008.

[2] "NOW Pet. App." refers to the appendix to the petition in No. 75-1005.

[3] On February 19, 1976, Mr. Justice Powell denied a motion to stay this and the previous orders.

BLEED THROUGH

may, at their option, collect a back pay award if they choose to waive certain claims arising out of antecedent acts of discrimination.

2. Whether the court of appeals correctly concluded that there was no abuse of discretion in the district court's refusal to allow the National Organization for Women, Inc., to intervene for the purpose of challenging the court-approved consent decrees.

3. Whether the consent decrees should have been disapproved because they may not presently resolve all issues of sex discrimination within the steel industry.

## STATEMENT

The Attorney General, on behalf of the Secretary of Labor, and the Equal Employment Opportunity Commission instituted this employment discrimination suit on April 12, 1974, in the United States District Court for the Northern District of Alabama, alleging that the defendants—nine major steel companies and the United Steelworkers of America, AFL-CIO—had engaged, nationwide, in discriminatory policies and practices that deprived the companies' minority and female employees of equal employment opportunities in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, *et seq.*, and Executive Order 11246. The complaint sought systemic injunctive and affirmative relief and compensatory monetary payments to individual victims of discrimination.

1. The lodging of this complaint with the district court, together with a proposed nationwide settle-

ment agreement in the form of two consent decrees, concluded more than six months of negotiations among the federal plaintiffs and the corporate and union defendants. On the next day, the complaint was formally filed, and the district judge signed and entered the decrees.[4]

Consent Decree I affects both the union and the companies (Harris Pet. App. 17a). It provides for extensive seniority and other reforms to remedy continuing effects of past discrimination and for affirmative action in the form of the establishment of goals and timetables for the admission of minority and female employees to trade and craft job categories in which they have been discriminatorily underrepresented (*ibid.*). The decree enjoins the defendants from discriminating on the basis of race, color, sex, or national origin in any aspect of employment and from failing or refusing fully to implement the equitable remedial measures provided for (*ibid.*). In addition, it establishes a back pay fund of more than $30 million from which all "affected employees" (as defined in paragraph 18(c) of the decree; FEP Manual 431:143) may be compensated (Harris Pet. App. 17a).

Specific provisions dealing with the allocation of this fund (FEP Manual 431:143-144) are designed "to provide the greatest amount of back pay * * * to those affected employees who have been most adversely affected by past employment practices and who have the greatest plant service" (*id.* at 144),

[4] The decrees are reproduced at FEP Manual 431:125-152.

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but in no event is an affected employee whose employment began prior to January 1, 1968, entitled to less than $250 (*id.* at 143). Paragraph 18 provides, in part, as follows (*id.* at 143, 144, 145):

> [I]n full compensation for all alleged injuries suffered by such persons by reason of any unlawful acts and practices within the scope of the complaint or this Decree, up to and including the date of the entry of this Decree, as well as any future claim of damages by reason of the continuance of the effects of such past discriminatory acts and practices, all of the parties have agreed * * *:
>
> * * * * *
>
> In order to receive such back pay, each affected employee shall be required to execute a release, in a form approved by the Audit and Review Committee,[5] of any claims against or liability of the Company, the Union [etc.] * * * resulting from any alleged violations based on race, color, sex * * * or national origin, occurring on or before the date of entry of this

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[5] Consent Decree I establishes an industry-wide Audit and Review Committee composed of representatives of the companies, the union, and the government, which is charged with the responsibility of overseeing compliance with the decree (Harris Pet. App. 18a-19a). Any matters that the members of this committee are unable to resolve may be brought to the district court, which retains jurisdiction for a minimum period of five years "for the purpose of issuing any additional orders or decrees needed to effectuate, clarify or enforce the full purpose and intent of this Decree" (*id.* at 19a; FEP Manual 431:146).

> Decree, of any equal employment opportunity laws, ordinances, regulations, or orders * * *. * * * Such release will also bar recovery of any damages suffered at any time after the date of entry of this Decree by reason of continued effects of any such discriminatory acts which occurred on or before the date of entry of this Decree.

Consent Decree II broadly enjoins the corporate defendants from discriminating in employment and directs them to undertake affirmative-action hiring and other goals and timetables for the admission of minorities and females to supervisory and other job categories from which they have been historically excluded, all in accordance with the provisions of an Agreement appended to the decree (FEP Manual 431:146-152). The district court retains jurisdiction for at least five years to monitor the implementation process (*id.* at 148).

Neither decree binds non-parties or precludes individual employees from filing or maintaining private suits for relief from employment discrimination (see FEP Manual 431:126, 147-148).

2. Between April 12, 1974, and May 17, 1974, various individuals and organizations moved to intervene for the purpose of challenging the back pay release provisions of the consent decrees (Harris Pet. App. 26a). The district court granted intervention as of right to 36 individuals. Three of the individuals were women appointed by NOW at the court's request and represented by NOW's attorney. They appeared

BLEED THROUGH

on behalf of classes of former, present, and future female employees of the defendant companies (*id.* at 26a-27a & n. 11). The court denied intervention to NOW itself and to the other organizations (*id.* at 5a).

Emphasizing that the decrees' "resolution * * * of issues between the government and the defendants does not preclude additional—or even inconsistent—relief in favor of private parties in other litigation" (*id.* at 8a), the district court found "nothing illegal * * * [in] the consent decrees themselves, neither in the basic approach to settlement reflected therein, the way in which such were negotiated and entered, nor the manner in which such will be implemented" (*id.* at 10a). With respect to the back pay release provisions, the court concluded that "there can be a legal waiver of back-pay claims where, for valuable consideration, a release is signed knowingly and voluntarily, with adequate notice which gives the employee full possession of the facts" (*id.* at 12a).

3. The court of appeals affirmed. It held that NOW was properly denied intervention because, *inter alia*, (1) "this was not a proper case for intervention as of right by *any* private party or organization pursuant to Rule 24(a)(1) [of the Federal Rules of Civil Procedure]" (*id.* at 34a; emphasis in original); (2) NOW failed to make the requisite showing under Rule 24(a)(2) that entry of the decrees "may, as a practical matter, operate to impair or impede the protection of its interest," because "[n]either NOW nor any of its members is bound by

*res judicata* or estopped to the consent decrees" (*id.* at 39a) and because NOW's interests were, in any event, protected by the presence of "its nominees and counsel during these entire proceedings" (*id.* at 41a); and (3) there was no abuse of discretion, within the meaning of Rule 24(b), in the district court's determination that NOW's participation would delay the proceedings to the detriment of other, more important interests (*ibid.*).

On the merits,[6] the court of appeals rejected petitioners' several challenges to the back pay settlement release provisions of the consent decrees (see *id.* at 56a). The court held (*id.* at 57a):

> [An] employee may release not only claims for additional back pay, but also claims for other relief—including injunctive—provided the released claims arise from antecedent discriminatory events, acts, patterns, or practices, or the "continuing" or "future" effects thereof so long as such effects are causally rooted—in origin,

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[6] In reaching the merits, the court said (*id.* at 42a, n. 22):

> Although we have determined that intervention as of right under F.R. Civ.P. 24(a)(1) was not available to the private parties and groups who sought intervention in this case, some of whose applications were granted below on the assumption that § 706(f)(1) of Title VII conferred such right, we proceed nonetheless to consider the merits of the attacks lodged against the consent decrees by the remaining intervenors-appellants. We do so on the assumption that the district court, having concluded that certain parties ought to be granted intervention either by right or by permission, would have allowed those parties to intervene in any event under either 24(a)(2) or (b).

BLEED THROUGH

> logic, and factual experience—in discriminatory acts or practices which antedate the execution of the release, and provided, of course, that the release is executed voluntarily and with adequate knowledge * * *.

The court construed the release provisions of Consent Decree I (FEP Manual 431:144-145) to mean that an employee executing a release in return for a compensatory monetary payment would waive (Harris Pet. App. 57a; emphasis in original):

> (1) *all claims* * * * asserting unlawful employment discrimination by the defendants * * * insofar as such claims are based on acts or practices, within the scope of the government's complaint or the consent decrees, which were completed on or before the date of the decrees' entry; and (2) claims for *damages* incurred *at any time* because of continued effects of complaint or decree-covered acts or practices which took place on or before the entry date of the consent decrees.

The court enumerated the rights which, in its view, would not or could not be waived by an employee executing a release, "because a waiver of these rights either does not follow from a fair reading of paragraph 18(g) * ** or else they are 'prospective' and employees may not waive them" (*id.* at 57a-58a):

> (1) The release will not bar an employee from suing in the future for additional *injunctive* relief if the reforms contemplated by the decrees do not eliminate continued effects which are causally grounded in past acts or practices

of discrimination. * * * [*Id.* at 58a; emphasis in original.]

(2) Any employee who feels aggrieved by the defendants' palpable disobedience of the terms of the decrees may sue, in effect, to enforce them. * * * [T]he defendants readily concede that an episode of nonadherence to the decrees may conceivably constitute a new violation of the law and give rise to a new cause of action under Title VII or other applicable law. Whether a particular instance of noncompliance may give rise to a new claim for damages, injunctive relief, or perhaps both or neither, will * * * depend on the circumstances. * * * [*Id.* at 59a]

(3) Clearly apart from compliance or noncompliance with the decrees, the release cannot preclude a suit for *any* form of appropriate relief for *subsequent* injuries caused by *future* acts or undertakings the effects of which are equivalent to the otherwise compromised, noncompensable effects of past discriminations covered by the complaint or the decrees. Thus, the defendants are responsible for their conduct * * *. If [they] engage in new discrimination * * * they will be fully liable for its provable effects and for provable economic losses caused thereby * * *. [*Id.* at 60a; emphasis in original.]

The court found the remainder of petitioners' arguments to be without merit.[7]

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[7] On remand, the district court granted the motions of the respondent companies and unions to amend Paragraph 18(g) of Consent Decree I to make explicit the understanding of the parties to the decree that execution of a waiver would release

BLEED THROUGH

## ARGUMENT

That the government may file suits to obtain broad relief from systemic employment discrimination is beyond dispute. That it may settle the suits it brings is equally plain. The court of appeals correctly characterized the settlement of which review is here sought as "one of those rare instances in which the government has, to its satisfaction, successfully negotiated a comprehensive voluntary accord" (Harris Pet. App. 46a).

1. Petitioners attack the back pay release provisions of Consent Decree I. But, as the court of appeals stated repeatedly (*e.g.*, Harris Pet. App. 19a, 23a, 40a & n. 21, 47a), the consent decrees do not bind individual employees unless they elect to be bound by signing releases and obtaining monetary compensation.[8]

Petitioners thus seek invalidation of provisions that cannot affect the companies' employees at all except by their own choice.[9] The relief sought would put

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all claims relating to pre-decree events, including claims for injunctive relief based on the continuing effects of such events (Harris Pet. App. 120a). The Harris petitioners have appealed this order to the court of appeals (Motion to Defer Consideration, pp. 1-3).

[8] On the other hand, "the injunctive relief provided by the consent decrees extends to all affected steelworkers, regardless whether they elect to accept the back pay and execute the releases" (Harris Pet. App. 48a).

[9] It is not alleged, nor could it be, that employees who execute releases will not do so "knowingly and voluntarily,

employees who do not intend to execute releases in no different position from the one they already occupy and would prevent employees who wish to sign releases from doing so. That relief is without meaning for the former group and, by definition, unwanted by the latter. Petitioners all but concede that their concerns are conjectural (Harris Pet. 11-12) or premature (Harris Motion to Defer Consideration).

In these circumstances, petitioners present no justiciable controversy. See *Warth* v. *Seldin*, 422 U.S. 490, 516; *International Longshoremen's & Warehousemen's Union, Local 37* v. *Boyd*, 347 U.S. 222, 224.

The dominant theme of the Harris petitioners' attack on the back pay release provisions is that they require an unlawful waiver of prospective rights. It is not disputed that the releases do not require a waiver of the right to assert future claims based on

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with adequate notice which gives the employee full possession of the facts" (Harris Pet. App. 12a). Paragraphs 17 and 18 of Consent Decree I (FEP Manual 431:142-143, 145) "establish mandatory procedures for fully informing private parties of their rights * * * [and] insure that individual employees have the opportunity to make free, intelligent decisions whether to accept the back pay under the consent decrees" (Harris Pet. App. 23a-24a; see also *id.* at 81a). Of course, in assessing the effectiveness of particular releases in the future, the district court will have to determine whether, in each instance, the employee's waiver was knowing and voluntary. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 52 & n. 15.

BLEED THROUGH

any new acts of discrimination that may occur after the entry of the decree. Petitioners argue, however, that there is no certainty that the reforms mandated by the consent decree will in fact eliminate all the effects of past discrimination, and that the possibility therefore exists that members of the affected class will continue, after the date of the decree, to suffer monetary loss as the result of discrimination that occurred before the entry of the decree. The right to recover for such possible continuing injury, they claim, is a prospective right that may not be waived.

There is nothing in law or reason to prevent a party from settling a claim for future damages resulting from a past wrong. *W.J. Perryman & Co.* v. *Penn Mutual Life Insurance Co.*, 324 F. 2d 791, 793 (C.A. 5). The releases here will not effect "a waiver in advance of a controversy" (*Wilko* v. *Swan*, 346 U.S. 427, 438). As the court of appeals correctly stated, "all the ingredients of controversy to be compromised under paragraph 18(g) have their operative and legally consequential origin in acts, patterns, and practices which were performed by the defendants up to and including [the date of the consent decrees]. Those operative ingredients are thus antecedent to any possible compromise, not prospective" (Harris Pet. App. 63a-64a).

Petitioners also argue that the releases would be unlawful insofar as they waive the party's future "right to sue for necessary injunctive relief if the seniority system is not fully reformed" (Harris Pet.

12). But that issue is not properly presented at the present stage of this case, because, under the court of appeals' interpretation of the decree, "[t]he release will not bar an employee from suing in the future for additional *injunctive* relief if the reforms contemplated by the decrees do not eliminate continued effects which are causally grounded in past acts or practices of discrimination" (Harris Pet. App. 58a; emphasis in original).

Although the district court has since amended the decree (in accordance with what it found to be the original intent of the parties) to provide that the releases will waive all claims, for injunctive as well as monetary relief, growing out of pre-decree discrimination (Harris Pet. App. 120a-122a, 126a), a challenge to the validity of that amendment is pending before the court of appeals on petitioners' appeal and petition for a writ of mandamus (see Harris Pet. 7; Motion to Defer Consideration, p. 2). The issue is not yet ripe for this Court's consideration.[10]

2. The court of appeals correctly concluded that the district court did not abuse its discretion in denying, without prejudice, NOW's motion to intervene.

Rule 24(a)(1) of the Federal Rules of Civil Procedure provides for intervention as of right "when a statute of the United States confers an unconditional right to intervene." There is no such applicable stat-

[10] There is no reason to defer consideration of the present petitions pending the Fifth Circuit's decision on the matters before it. Petitioners will be free to seek review by this Court of any judgment subsequently entered by the court of appeals.

BLEED THROUGH

ute here. This is—as the court of appeals recognized (Harris Pet. App. 34a) and as NOW acknowledges (NOW Pet. 4)—a government "pattern or practice" suit under Section 707 of the Civil Rights Act of 1964, 42 U.S.C. 2000e-6, not a suit by the Equal Employment Opportunity Commission as representative of specific complainants under Section 706. Section 707, unlike Section 706, contains no language regarding intervention by "persons aggrieved."

Nor should a right to private intervention be read into Section 707, for the statutory scheme clearly evidences a congressional intent to distinguish between the private interests at stake in Section 706 actions to redress particular employee grievances and the public interest in nondiscriminatory employment practices that is vindicated through Section 707. This Court has noted such a public-private distinction in various contexts. See, *e.g.*, *Trbovich* v. *United Mine Workers*, 404 U.S. 528, 538-539; *United States* v. *Raines*, 362 U.S. 17, 27; *United States* v. *Borden Co.*, 347 U.S. 514, 518. Where, as here, a government enforcement action in the public interest, under a statute that does not expressly advert to any private right of intervention, has resulted in a consent judgment not binding on private parties, no such right should be recognized. *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 689.

Relying upon *Trbovich* v. *United Mine Workers*, *supra*, NOW asserts the public-private dichotomy discussed above as support for a right to intervene on behalf of its members under Fed. R. Civ. P. 24

(a)(2) (NOW Pet. 6-8). There is support in *Trbovich* for the conclusion that, if NOW members employed by the corporate defendants had a legally cognizable stake in the settlement of this suit, their interest would be sufficiently distinct from that of the government to satisfy the "interest" requirement of Rule 24(a)(2). Thus if, assuming *arguendo* the existence of a constitutionally sufficient interest, those members had not been otherwise represented in the proceedings below, NOW might have had the necessary standing to assert their rights. *Warth* v. *Seldin*, *supra*, 422 U.S. at 511; *NAACP* v. *Alabama*, 357 U.S. 449, 458-459.

But the interests of NOW and its membership *were* represented, both by NOW's attorney and by three individual members selected by the organization at the district court's request (see pp. 6-7, *supra*). NOW does not demonstrate, or even allege, that that representation was inadequate. Therefore, it has not shown its entitlement to intervene under Rule 24(a)(2).

In granting limited intervention in *Trbovich*, *supra*, this Court noted that no other remedy was available to the applicant under the statute there at issue (404 U.S. at 531). By contrast, "persons aggrieved" by employment discrimination may obtain relief under Title VII through Section 706 of the Act.[11] In any

[11] Thus, NOW's assertion that "the decision of the Fifth Circuit herein could foreclose the ability of individuals affected by government-negotiated decrees to have an effective voice in the process of remedying employment discrimination" (NOW Pet. 8) is without merit. NOW is incorrect in its state-

BLEED THROUGH

event, as a constitutional matter, NOW lacks representational standing to enter the case because, as we have shown (pp. 11-12, *supra*), the consent decrees threaten neither its members nor any other employee of the defendant companies with any harm. See *Warth* v. *Seldin*, *supra*, 422 U S. at 511, 516; *Sierra Club* v. *Morton*, 405 U.S. 727, 734-741. See also *United States* v. *SCRAP*, 412 U.S. 669, 688.

3. NOW asks this Court to review the decision below on the ground that the consent decrees do not presently resolve all issues of sex discrimination in the steel industry (NOW Pet. 8-12). But settlement "normally embodies a compromise" (*United States* v. *Armour & Co.*, 402 U.S. 673, 681), and nothing in Title VII or Executive Order 11246 requires the Attorney General, the EEOC, or the Secretary of Labor, in enforcement proceedings, to resolve every issue of employment discrimination that may exist or arise.

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ment (*id.* at n. 10) that the decrees require the government to "take the side of the discriminators in any * * * separate litigation." The decrees merely state that "[i]f a private individual seeks, in a separate action or proceeding, relief other than back pay which would add to or be inconsistent with the systemic relief incorporated in this Decree, the plaintiffs will undertake to advise the Court * * * that such relief in that action or proceeding is unwarranted" (FEP Manual 431:126, 148). The court of appeals correctly pointed out that "no forum court will be legally obliged to follow any government recommendation" (Harris Pet. App. 22a).

Here, of course, individuals potentially affected by the decrees have been allowed to intervene and voice their objections to the decrees.

Here, through negotiation and settlement, the government has succeeded in obtaining nationwide, comprehensive relief from employment discrimination in a major industry. In doing so, it has not impeded the rights of individual employees to seek other relief. At the same time, the relief obtained by the government is not limited to employees who agree to forgo those rights; it "extends to all affected steelworkers" (Harris Pet. App. 48a). Thus, the court of appeals was correct in concluding that the effect of the consent decrees "is to leave the individual grievant in a position no worse, but in fact better, than that occupied in the absence of the settlement" (*id.* at n. 26). In addition, the district court's express retention of jurisdiction (FEP Manual 431:146, 148) permits the entry of further relief as appropriate (see Harris Pet. App. 19a). Particularly in these circumstances, "[t]he decrees * * * are not made unlawful simply because they presently fail to deal with every conceivable allegation of discrimination in the steel industry" (Harris Pet. App. 117a).

## CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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